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No. 98-963-CFX

Title: Jeremiah W. (Jay) Nixon, Attorney General of
Missouri, et al., Petitioners
v.
Shrink Missouri Government PAC, et al.

Docketed:

December 14, 1998

Court: United States Court of Appeals for
the Eighth Circuit

Entry Date

Proceedings and Orders

Entry Date	Proceedings and Orders
Dec 11 1998	Petition for writ of certiorari filed. (Response due January 13, 1999)
Dec 31 1998	Waiver of right of respondent Joan Bray to respond filed.
Jan 5 1999	Brief amici curiae of Secretaries of State of Maine, et al. filed. VIDED.
Jan 6 1999	DISTRIBUTED. January 22, 1999
Jan 6 1999	Brief of respondents Shrink Missouri Government PAC and Zev David Fredman in opposition filed.
Jan 11 1999	Reply brief of petitioners Jeremiah Nixon, Attorney General, et al. filed.
Jan 25 1999	Petition GRANTED. SET FOR ARGUMENT October 5, 1999.
Feb 5 1999	***** Order extending time to file brief of petitioner on the merits until April 10, 1999.
Apr 9 1999	Brief amicus curiae of Public Citizen filed.
Apr 9 1999	Brief of respondent Joan Bray in support of petition filed.
Apr 12 1999	Brief amici curiae of Common Cause, et al. filed.
Apr 12 1999	Brief amicus curiae of United States filed.
Apr 12 1999	Brief amici curiae of John E. Reed, et al. filed.
Apr 12 1999	Joint appendix filed.
Apr 12 1999	Brief of petitioners Jeremiah Nixon, Attorney of Missouri, et al. filed.
Apr 12 1999	Brief amici curiae of Secretaries of State of Arkansas, et al. filed.
Apr 12 1999	Brief amici curiae of Norman Dorsen, et al. filed.
Apr 12 1999	Brief amicus curiae of Paul Allen Beck, et al. filed.
Apr 12 1999	Brief amici curiae of Ohio, et al. filed.
Apr 14 1999	Lodging consisting of one copy of Campaign Finance Law 98, submitted by counsel for amici states, Ohio, et al. Lodging Consisting of twenty copies of all Campaign Finance Disclosure Reports submitted by counsel for the petitioners.
Apr 19 1999	Order extending time to file respondents' brief on the merits until June 7, 1999.
May 5 1999	Brief amicus curiae of U.S. Term Limits, Inc. filed.
Jun 4 1999	Brief amicus curiae of Pacific Legal Foundation and Lincoln Club of Orange County filed.
Jun 4 1999	Brief amicus curiae of Madison Center for Free Speech filed.
Jun 4 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jun 7 1999	Brief of respondents Shrink Missouri Government PAC and Zev David Fredman filed.
Jun 7 1999	Brief amici curiae of Gun Owners of America, et al. filed.

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Entry Date

Proceedings and Orders

Jun 7 1999	Brief amici curiae of First Amendment Project of Americans Back in Charge, et al. filed.
Jun 7 1999	Brief amici curiae of Mitch McConnell, Missouri Republican Party, et al. filed.
Jun 7 1999	Brief amici curiae of American Civil Liberties Union, et al. filed.
Jun 7 1999	Brief amici curiae of National Right to Life PAC State fund, et al. filed.
Jun 24 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jul 9 1999	Reply brief of respondent Joan Bray in support of petitioner filed.
Jul 12 1999	Reply brief of petitioner Jeremiah Nixon, Attorney General of Missouri, et al. filed.
Jul 23 1999	Supplemental brief of respondents Shrink Missouri, et al. filed.
Jul 26 1999	LODGING consisting of three sets of all campaign finance disclosure reports filed with the Missouri Ethics Commission submitted by counsel for the petitioner in three boxes for each set.
Aug 16 1999	Record filed.
Aug 26 1999	CIRCULATED.
Sep 27 1999	Record filed.
Oct 5 1999	ARGUED.

No. _____

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OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON, Attorney General of Missouri;
RICHARD ADAMS, PATRICIA FLOOD, ROBERT GARDNER,
DONALD GANN, MICHAEL GREENWELL and ELAINE
SPIELBUSCH, members of the Missouri Ethics Commis-
sion; and ROBERT P. McCULLOCH, St. Louis County
Prosecuting Attorney;

Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC and
ZEV DAVID FREDMAN,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in declaring that Missouri's campaign contribution limits for statewide office, which exceed the limits expressly approved by this Court for national elections in *Buckley v. Valeo*, 424 U.S. 1 (1976), violates the First Amendment.

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption except for Joan Bray, a member of the Missouri House of Representatives who intervened as a defendant below. Pursuant to Fed. R. App. P. 43(c)(1), Donald Gann and Michael Greenwell, newly appointed members of the Missouri Ethics Commission, are substituted for their predecessors, Ervin Harder and John Howald.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

No. _____

JEREMIAH W. (JAY) NIXON, Attorney General of Missouri;
RICHARD ADAMS, PATRICIA FLOOD, ROBERT GARDNER,
DONALD GANN, MICHAEL GREENWELL and ELAINE
SPIELBUSCH, members of the Missouri Ethics Commis-
sion; and ROBERT P. MCCULLOCH, St. Louis County
Prosecuting Attorney; *Petitioners,*

v.

SHRINK MISSOURI GOVERNMENT PAC and
ZEV DAVID FREDMAN,
_____ *Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Jeremiah W. (Jay) Nixon, Richard Adams,
Patricia Flood, Robert Gardner, Donald Gann, Michael
Greenwell, Elaine Spielbusch, and Robert McCulloch re-
spectfully petition for a writ of certiorari to review the
judgment of the United States Court of Appeals for the
Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.")
1a-19a), entered on November 30, 1998, has not yet

been reported. The court of appeals' order entering an injunction pending appeal (App. 20a-23a) is reported at 151 F.3d 763 (8th Cir. 1998). The opinion of the district court (App. 24a-41a) is reported at 5 F.Supp. 2d 734 (E.D.Mo. 1998).

JURISDICTION

The court of appeals entered its judgment on November 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Mo. Rev. Stat. § 130.032 (1984) (footnote omitted) provides in pertinent part:

1. . . . [T]he amount of contributions made by or accepted from any person in any one election shall not exceed the following:

(1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, one thousand dollars;

(2) To elect an individual to the office of state senator, five hundred dollars;

(3) To elect an individual to the office of state representative, two hundred fifty dollars;

(4) To elect an individual to any other office, . . . if the population of the electoral district, ward, or other unit according to the latest decennial census is under one hundred thousand, two hundred fifty dollars;

(5) To elect an individual to any other office, . . . if the population of the electoral district, ward, or other unit according to the latest decennial census is at least one hundred thousand but less than two hundred fifty thousand, five hundred dollars; and

(6) To elect an individual to any other office, . . . if the population of the electoral district, ward, or other unit according to the latest decennial census is at least two hundred fifty thousand, one thousand dollars.

2. For purposes of this subsection "base year amount" shall be the contribution limits prescribed in this section on January 1, 1995. Such limits shall be increased on the first day of January in each even-numbered year by multiplying the base year amount by the cumulative consumer price index, as defined in section 104.010, [Mo. Rev. Stat. 1994], and rounded to the nearest twenty-five-dollar amount, for all years since January 1, 1995.¹

3. Candidate committees, . . . campaign committees and continuing committees, other than those continuing committees which are political party committees, shall be subject to the limits prescribed in subsection 1 of this section. The provisions of this subsection shall not limit the amount of contributions which may be accumulated by a candidate committee and used for expenditures to further the nomination or election of the candidate who controls such [] committee, except as provided in section 130.052.

. . . .

7. Any committee which accepts or gives contributions other than those allowed shall be subject to a surcharge of one thousand dollars plus an amount equal to the contribution per nonallowable contribution, to be paid to the ethics commission and which shall be transferred to the director of revenue, upon

¹ For 1998, the amounts are \$275, \$525, and \$1075.

notification of such nonallowable contribution by the ethics commission, and after the candidate has had ten business days . . . to return the contribution to the contributor. The candidate and [any other person] owing a surcharge shall be personally liable for the payment of the surcharge [and] . . . [s]uch surcharge shall constitute a debt to the state enforceable under, but not limited to, the provisions of chapter 143, [Mo. Rev. Stat. 1994].

INTRODUCTION AND STATEMENT

The headlines in every major newspaper in the United States and the broadcasts every night on the evening news programs reveal unmistakably that there is a widespread perception in this Country of abuse and corruption in campaign financing. There is a real fear, which may be stronger today than at any time in recent memory, that money is harmfully distorting the nation's political process. Not surprisingly, in such an environment, there is strong political pressure on legislators at all levels of government to adopt restrictions that will eliminate or at least deter efforts to pollute the political process.

Of course, campaign reform cannot be implemented legislatively without regard to the Constitution. Political discourse is without question one of the most fundamental freedoms Americans enjoy and thus governmental efforts to regulate the campaign process necessarily must be mindful of the commands of the First Amendment. But, just as the nation gears up for what likely will be a watershed year in its attempts to adopt reforms that respond at least to the perception of a campaign system run amok, the court of appeals in this case has issued a First Amendment ruling that seriously complicates an already complex process of implementing meaningful change. Thus, instead of debating the merits of particular campaign contribution limits, legislators—particularly those in the Eighth Circuit—now either will refuse to act because of the constitutional impediments or will act at their peril with no assurance that any campaign limits they adopt

will withstand judicial scrutiny. This constitutional limbo is intolerable.

The holding of the Eighth Circuit also casts a serious cloud over the proper meaning of *Buckley v. Valeo*, 424 U.S. 1 (1976). Indeed, under the logic of the opinion below, even the federal contribution limit upheld in *Buckley* is no longer constitutional. Moreover, it is clear that the limits embodied in Missouri's legislation would be upheld today by the Sixth Circuit, *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir.), *cert. denied*, 118 S. Ct. 162 (1997). In sum, it would be difficult to find an issue of greater national significance that both requires and warrants some measure of legal certainty at this pivotal point in time when the nation undertakes to decide how best to prevent further deterioration of the citizenry's perception of the unfairness of our current system of electing government officials.

1. Since at least 1907, legislatures have repeatedly tried to prevent government officials and candidates for office from accepting money from those with financial interests in official action. See *United States v. UAW-CIO*, 352 U.S. 567, 575 (1957). For many years, those efforts were limited to bribery laws and to laws restricting campaign contributions from corporations, labor unions, and government employees. See, *id.* at 575-87. The inadequacy of those efforts was dramatically demonstrated by the serious abuses that occurred during the 1972 presidential election. Congress and many state legislatures reacted by enacting broader reforms, such as federal disclosure requirements and contribution limits. Most prominent among them was the Federal Election Campaign Act ("FECA").

A principal FECA reform was to limit contributions by individuals to candidates for all federal offices to \$1000 per election per contributor.² In 1976, that limit

² 2 U.S.C. § 441a(a)(1)(A). The statute permits \$20,000 contributions to political party committees (§ 441a(a)(1)(B)), \$5,000 contributions to other qualified political committees (§ 441a(a)(1)

was upheld in *Buckley v. Valeo*. 424 U.S. at 28. Thirty-five states and many cities have since adopted contribution limits—some below, some above, but most near the FECA limits affirmed in *Buckley*. These provisions are outlined in the appendix to the petition. App. 42a-44a, *infra*. To be sure, limits that are substantially below \$1000 have been held to be unconstitutional,³ but this is the first reported case rejecting limits at the FECA level, as violative of the First Amendment.

Missouri adopted contribution limits in 1994.⁴ As adjusted for inflation since 1994, the statute now prohibits candidates for public office from accepting contributions over \$275, \$525, or \$1075, depending on the size of the constituency. Constituency size correlates with the amount that candidates need to amass in order effectively to campaign. It also correlates with the amount that an individual can give before his or her contribution constitutes such a large portion of a campaign treasury that the contribution merits special attention from the candidate. Most pertinent here was the \$1075 limit that, until the court of appeals entered its injunction, prevented respondent Shrink Missouri Government PAC from making large contributions to respondent Fredman, a candidate for state auditor.

(C)), and \$17,500 contributions by major party senatorial campaign committees to candidates for the U.S. Senate (§ 441a(h)). Only the \$1000 limit is used for comparison here because the respondent Shrink Missouri Government PAC would not qualify as a political committee under § 441a(a)(4).

³ *E.g.*, *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir.), *cert. denied* 518 U.S. 1033 (1996); *Russell v. Burris*, 146 F.3d 563, 568 (8th Cir. 1998), *cert. denied* 67 USLW 3177 (Nov. 16, 1998); *National Black Police Ass'n v. District of Columbia Bd. of Elections*, 924 F. Supp. 270, 272 (D.D.C. 1996), *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997).

⁴ Actually, Missouri enacted two statutes. The legislature's version is at issue here. A much lower set of limits, placed on the ballot by initiative and passed by referendum as "Proposition A," was previously held to be unconstitutional. *Carver v. Nixon*, 73 F.3d at 645.

For years after enactment of Missouri's law in 1994, there was no dispute that Missouri's \$1075 was the maximum any Missouri candidate could accept. In fact, the Eighth Circuit had announced that it "generally accept[ed] the limits established by the legislature." *Carver*, 72 F.3d at 641. Thus, all candidates in the 1996 elections for governor, lieutenant governor, secretary of state, treasurer, attorney general, and the legislature were forced to comply with the limits. And until the court of appeals acted in this case, candidates in the 1998 election for state auditor had to conform to the limits that now have been stricken by the court below.

2. The filing of this suit last February was the candidates' first notice of a dispute over the State's ability to mirror the FECA limits. But even the news of the initiation of this litigation left little reason to question whether the rules would change. The district court denied first a temporary restraining order, then a preliminary injunction, and finally a permanent injunction. App. 25a-26a, 41a, *infra*. Candidates were left with the understanding that they, like the candidates in 1996, would continue to raise money and operate campaigns under the modest constraints of the 1994 statute. That understanding disappeared just twelve days before the August 4 primary elections, when the court of appeals entered its injunction pending appeal. The rules changed dramatically; candidates could again accept contributions of literally any size.⁵

Petitioners immediately sought rehearing *en banc*. When the court of appeals did not rule in a timely fashion, petitioners unsuccessfully sought a stay from the Circuit Jus-

⁵ That distinguishes this case from its predecessors identified in note 3, *supra*. In each of those cases, elimination of the particular limits at issue simply reinstated a set of limits closer to the FECA model. Now Missouri has no contribution limits in place and no assurance that some larger limit will withstand the constitutional scrutiny applied by the court of appeals in this case. See pp. 13-15, *infra*. (Compelling state interest test and least restrictive means analysis pose virtually insuperable burdens on state).

tice. The court of appeals *en banc* denied the motion for rehearing on August 20 and the case was argued on August 21. On November 30, 1998, the Eighth Circuit became the first court to hold unconstitutional a contribution limit that is higher than the one affirmed in *Buckley*, a limit which remains in effect to this day for all federal elections.

3. In reaching its conclusion, the panel majority acknowledged that its holding conflicts with the decision of the Sixth Circuit in *Kentucky Right to Life, Inc.*, which upheld a \$1000 limit. In defense of its holding, the panel first concluded that Missouri's contribution limit is subject to the compelling state interest standard of judicial scrutiny. While the court was willing to characterize Missouri's interest in eliminating the public's perception of corruption as "compelling," the panel was unwilling to accept the Missouri legislature's judgment that such a public perception actually exists that would justify placing a \$1075 limit on contributions to statewide candidates. In addition, the panel held that the contribution limit could not withstand scrutiny under the "least restrictive means" test. Although the panel recognized that *Buckley*'s approval of a \$1000 limit should be "something of a benchmark," the court below nevertheless rejected Missouri's \$1075 limit as "heavy-handed" in light of inflation over the past 25 years. App. 8a, *infra*.

Judge Ross concurred separately. He rejected the idea that a \$1075 limit is different in kind from the \$1000 limit approved in *Buckley*, but otherwise joined in finding Missouri's statute unconstitutional. App. 9a-10a, *infra*.

Judge Gibson dissented. He argued that the evidence of a compelling interest in *Buckley* was no different from the proof in this case and that the limitation here is not "different in kind" from the limitation approved in *Buckley*. The dissent then identified the square conflict between the Sixth Circuit's fidelity to *Buckley* and the majority's unwillingness to be "bound by *Buckley* unless and until the Supreme Court declares otherwise." App. 19a, *infra*.

REASONS FOR GRANTING THE PETITION

Taking widely divergent paths in applying precedents from this Court, courts of appeals have reached conflicting decisions as to both where the floor on contribution limits is and the proper method of constitutional analysis to be applied. Left unresolved, those conflicts will lead to confusion, increase the public cynicism about the integrity of elections throughout the United States, and inhibit the ability of legislatures effectively to reform campaign laws.

I. THE EIGHTH CIRCUIT'S DECISION REJECTING A \$1075 LIMIT CONFLICTS WITH THE SIXTH CIRCUIT'S DECISION UPHOLDING A \$1000 LIMIT AND WARRANTS REVIEW BY THIS COURT.

This Court has addressed limits on contributions to candidates for office only once, in *Buckley v. Valeo*. At issue, *inter alia*, was FECA's provision limiting to \$1000 contributions made by individuals to candidates. FECA lumped together federal elections ranging from that for delegate from American Samoa (1972 population: 28,202) to the presidency of the United States (1972 population: over 203 million). The \$1000 barrier upheld by this Court still applies to all candidates for federal office.

The Eighth Circuit has become the first court to strike down as unconstitutional a statute that exceeds the \$1000 limit blessed by the Court in *Buckley*. Petitioners believe, as did the dissent below, that the majority's decision conflicts with the ultimate holding in *Buckley*. But more important at this moment is that the decision below creates an irreconcilable and acknowledged inter-circuit conflict between the Eighth Circuit's rejection of a \$1075 limit and the declaration of the Sixth Circuit that a \$1000 limit is constitutional. *Kentucky Right to Life, Inc.*, 108 F.3d at 648.

This conflict among the courts of appeals arising out of the doctrinal bases of *Buckley* is more than a matter of

academic interest. The integrity of the election process is dependent on clear, consistent, and understandable rules—rules that do not change at some critical point in a campaign cycle. The integrity of an election process itself is threatened by the conflicting results in the Eighth and Sixth Circuits—especially because those conflicts may be exploited for political advantage by carefully timing the filing of constitutional challenges to contribution limits in other states. Even federal elections may be threatened. The inflation-based rationale that animated the Eighth Circuit's decisions here and in prior cases clearly opens the door to a challenge to the FECA despite *Buckley*, and the Eighth Circuit's insistence on proof beyond that found in *Buckley* could lead at least that court to reject the FECA limits, most likely once the 2000 presidential and congressional campaigns are well under way.

It is thus vital that the Court consider the issue now rather than allow the problem to fester and potentially surface in the middle of the next election cycle. Candidates need to know what the rules are and to know that those rules will not be altered in the middle of the campaign. A decision on campaign contributions at this time by this Court is the only way to ensure that the 1999 and 2000 elections are conducted according to fair and consistent rules. Accordingly, the Court should grant the petition so that it can resolve the issue this Term.

II. THE EIGHTH CIRCUIT HAS CREATED A CONFLICT AMONG THE CIRCUITS IN DEFINING THE LEVEL OF SCRUTINY GIVEN TO LIMITS ON CONTRIBUTIONS MADE TO CANDIDATES.

Not only is there a square conflict as to the validity of a campaign contribution limit, but also there is a subsidiary conflict among the circuits concerning the proper level of judicial scrutiny to apply to restrictions on the permissible amount of a campaign contribution. Thus, although the Ninth Circuit has not been faced with a contribution limit comparable to the one here, neverthe-

less, it has announced and applied a starting point—intermediate scrutiny—that is critically different from the compelling interest standard chosen by the Eighth Circuit. The Sixth Circuit has adopted the same approach as the Ninth.

Of course, all the courts have cited *Buckley* when addressing the level of scrutiny to be applied in considering challenges to contribution limits. There this Court spoke of a "rigorous standard of review" and examined the government's "weighty interests." 424 U.S. at 29. But this Court characterized contribution limits as imposing "only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20-21. That is not the language of "strict scrutiny." Language does appear later in *Buckley*, as the Court turned its attention to candidate expenditure limits, that seems plainly to embrace strict scrutiny. But the contrast in analysis between the two issues casts serious doubt that this Court meant to apply a compelling state interest standard to campaign contribution limits.

Later decisions by this Court reveal that the differences in language in the different parts of *Buckley* were the product of analytical differences and not happenstance. In *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), speaking for the plurality, Justice Marshall pointed out that the Court had applied different standards to contribution limits than it had applied to expenditure limits. He said that "'speech by proxy' . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." 453 U.S. at 196 (plurality). The act of contributing to candidates is an "attenuated form of speech [that] does not resemble the direct political advocacy to which this court in *Buckley* accorded substantial constitutional protection." *Id.* at 196 n.16. In the view of the *California Medical Ass'n* plurality, there was a measurable difference between the "strict" or "exacting" scrutiny that is to be applied to limits affecting independent expenditures and the level of

scrutiny that is to be applied to limits on contributions to candidates. Only one member of the Court disagreed; the dissent relied solely upon jurisdictional grounds. See *id.* at 201-04 (Blackmun, J., concurring), 204-09 (Stewart, J., dissenting).

The Ninth Circuit has adopted the view of the *California Medical Ass'n* plurality as to the correct reading of *Buckley*; and the Eighth Circuit has rejected it. Thus in deciding cases challenging contribution limits these courts have held:

Ninth: "[W]hile contribution limitations are reviewed under a 'rigorous' level of scrutiny, they are not reviewed under strict scrutiny." *VanNatta v. Keisling*, 151 F.3d 1215, 1220 (9th Cir. 1998).

Eighth: "Thus, we apply strict scrutiny." *Carver*, 73 F.3d at 638, cited and applied by the court of appeals in this case at App. 5a [slip op. at 5].

This conflict is significant, for "[o]nly rarely are statutes sustained in the face of strict scrutiny." *Bernal v. Fainter*, 467 U.S. 216, 220 n.6 (1984). Nothing in the Eighth Circuit's decisions suggests that any effective or reasonable contribution limit, whether adopted by the states, by cities, or by Congress, could survive the strictest level of judicial review. So far, in considering campaign finance reform, the Eighth Circuit has proven the wisdom of Justice Marshall's observation that "scrutiny that is strict in theory [is] fatal in fact." *Fullilove v. Kluznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

The Sixth Circuit has adopted the same reading of *California Med. Ass'n* as the Ninth, and this is also in conflict with its neighbor, the Eighth Circuit. In *Kentucky Right to Life, Inc.*, the Sixth Circuit relied upon *Buckley* and *California Med. Ass'n* for the proposition that a contribution limit "does not receive the full First Amendment protection." 108 F.3d at 649. Thus, when it concluded that a \$1000 limit is constitutional, the Sixth Circuit clearly did not follow the strict scrutiny path that

the Eighth Circuit derived from *Buckley* and the First Amendment. See 108 F.2d at 648.

Absent a decision by this Court, one by one the other federal circuits will choose between the level of judicial review adopted by the Eighth Circuit or the one applied by the Sixth and the Ninth. But, already campaign finance reforms in Kentucky and Tennessee are subject to different levels of judicial review than reforms just the other side of the Mississippi River, in Missouri and Arkansas. That difference on a matter that fundamentally affects the political landscape in each State should not be countenanced by this Court.

III. THE METHOD IN WHICH THE EIGHTH CIRCUIT APPLIES THE COMPELLING STATE INTEREST STANDARD CONFLICTS WITH BOTH *BUCKLEY* AND THE SIXTH CIRCUIT AND IMPOSES AN IMPOSSIBLE BURDEN ON GOVERNMENTS SEEKING TO ENACT REASONABLE LIMITS ON CAMPAIGN CONTRIBUTIONS.

The effect of adopting a "compelling interest" standard for judging the constitutionality of campaign contributions is that it imposes upon the States two extraordinary burdens in order to enact permissible limits on such contributions. The method chosen by the Eighth Circuit to apply those burdens transforms them from extraordinary to impossible.

First, the Eighth Circuit's analysis of the State legislature's fact-finding concerning the magnitude of its interest in adopting contribution limits is utterly nondeferential. Thus, in stark contrast to this Court's analysis of the legislative record in *Buckley*, which was based on razor-thin evidence and where the Court was willing to accept largely on faith Congress's assessment of the existence of a compelling problem arising out of large contributions during political campaigns, the Eighth Circuit approached the same issue with marked skepticism. Thus, in *Buckley* the Court was deferential to the legislative judgment and

refused to insist that Congress "fine tune" the limits on contributions. 424 U.S. at 30. In the Eighth Circuit, the majority demanded that Missouri "must prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." App. 6a, *infra*.

The majority was unwilling to accept the State's proof, which included an affidavit from the co-chair of the Committee on Campaign Finance Reform that the legislature "believed that contributions over [the statutorily prescribed maximums] create both the appearance that contributors could purchase the votes of elected officials and the danger of actual vote-buying." App. 15a, *infra* (Gibson, J., dissenting). As Judge Gibson concluded: "The Court's rejection of . . . Senate Bill 650's legislative underpinnings is plainly at odds with *Buckley*." *Id.*

The court of appeals' insistence upon clear proof of a social problem is troublesome because it demonstrates the great height of the first practical hurdle that arises out of a compelling state interest test. But at least a legislature can theoretically overcome this obstacle by making some kind of findings regarding the precise nature of the problems arising out of campaign financing.⁶ By contrast, the

⁶ The use of the adjective "theoretical" is vital here. Ever since the Eighth Circuit started down this path in *Carver v. Nixon*, states have tried to find evidence that would be sufficient to meet the court's standard. But no matter what evidence the states have presented, the Eighth Circuit has concluded that they failed. Today, there is no reason to believe that the Eighth Circuit could be satisfied, because that court has not identified any type of evidence that would satisfy its standards. As the dissenting judge correctly observed, even the evidence in *Buckley* would not be enough under this new standard. App. 10a [slip op. at 10] (the FECA limits were affirmed in *Buckley* "[u]pon a record more slender than the one before us"). As a result, cities and states in the Eighth Circuit that have contribution limits are required to prove what may be impossible to show, while states and cities outside the circuit are free to rely on the conclusions and type of proof found adequate in *Buckley*.

majority's aggressive application of the second part of the test, the least restrictive means or narrowly tailoring analysis, all but guarantees that no state legislature could enact a contribution limit that can withstand judicial scrutiny in the Eighth Circuit.

Taken to its logical extreme, Missouri must prove "objectively" (App. 7a) that a reasonable contributor could actually buy undue influence for \$1076, or would be perceived as having purchased such influence for \$1076, if the State wished to adopt a \$1075 limit. This, of course, is flatly inconsistent with this Court's observation in *Buckley* that the extent of the problem of actual or perceived corruption "can never be reliably ascertained." 424 U.S. at 27. It is also fundamentally inconsistent with the Sixth Circuit's reasoning, based on *Buckley*, that "the judiciary should not take out a scalpel to probe dollar limitations." *Kentucky Right to Life, Inc.*, 108 F.3d at 648. Thus, the Sixth Circuit plainly would not embrace the exacting approach adopted below that would force legislatures to demonstrate why a one dollar difference makes all the constitutional difference in the world.

Indeed, unless this Court were to adopt the view that no limits are permissible on campaign contributions, which would be a radical expansion of the First Amendment and a devastating blow to government efforts to clean up the campaign process, then it is difficult to imagine a law for which strict scrutiny seems less well suited. Under strict scrutiny the presumption of constitutionality is reversed and thus it will be the government's burden to prove that whatever limit it imposes is the least restrictive means of achieving its overall result of eliminating the perception of corruption. The burden of proving that raising a limit one, ten, or even a hundred dollars will eliminate or even significantly dilute its prophylactic impact is impossible to sustain. Thus, there can be no serious doubt that the strict scrutiny standard will be "fatal in fact" to all contribution limits.

IV. THE EIGHTH CIRCUIT'S DECISION INVOLVES MATTERS OF OVERRIDING NATIONAL IMPORTANCE THAT WARRANT REVIEW NOW TO AVOID MID-CAMPAIGN CONSTITUTIONAL CHALLENGES IN FUTURE ELECTIONS AND TO AVOID DISTORTING THE CURRENT NATIONAL DEBATE ON CAMPAIGN REFORM.

This case would merit consideration by this Court even if the Eighth Circuit were the only court to have considered the questions in this case. The rules adopted by the court below threaten to increase, not decrease, the public's skepticism about the integrity of the election process.

Thus, the circumstances of this case, by themselves, reveal how important it is for the Court to provide guidance on the correct legal standards now rather than wait until the next election cycle begins. Dozens of states and scores of local jurisdictions (App. 42a-44a, *infra*) have adopted statutory limits on campaign contributions. All of those limitations are now subject to serious constitutional challenge under the Eighth Circuit's rationale. It is certainly true that such a challenge will not succeed in Kentucky, Ohio, Michigan and Tennessee (at least in federal court), but everywhere else it is impossible to predict what the outcome of litigation will be. What is worse is that the litigation can itself become a tactical weapon in the candidates' arsenal during a campaign. Thus, the possibility of a successful judicial challenge to limits on contributions in the middle of a heated political struggle heightens the need to have these issues resolved now rather than during a campaign. No one can seriously doubt that elections should be decided on grounds other than successful litigation strategies.

The significance of this case, however, is not limited to the threat of lawsuits disrupting future elections. It also inhibits congressional and legislative efforts to further reform the campaign finance system. Congress and legislatures do not know what standards they must meet

in their ongoing efforts to address problems such as the "soft money" contributions that the media have tied so closely to the perception of public corruption after the 1996 presidential campaign. Congress and legislatures do not know whether they can rely on the type of record made in adopting the FECA, or instead must meet some undefined new level of proof.

Legislators at all levels will recognize that the conflicts among the circuits and the doubts now cast over the meaning of *Buckley* erect an effective barrier to their efforts to regulate campaign activities to protect the integrity of elections by eliminating actual and perceived sources of corruption. Only intervention by this Court at this time can ensure that the nation's pending debate about the future of campaign regulation will be based on the merits of reform and not on which constitutional rules will apply to whichever reforms legislators ultimately would conclude best serve the public interest.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDICES

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2351

SHRINK MISSOURI GOVERNMENT PAC,
a political action committee;
ZEV DAVID FREDMAN,
v. *Appellants,*

RICHARD ADAMS, in his official capacity as a Member of
the Missouri Ethics Commission; PATRICIA FLOOD, in
her official capacity as a Member of the Missouri
Ethics Commission; ROBERT GARDNER, in his official
capacity as a Member of the Missouri Ethics Com-
mission; ERWIN HARDER, in his official capacity as
a Member of the Missouri Ethics Commission; JOHN
HOWALD, in his official capacity as Chairman of the
Missouri Ethics Commission; ELAINE SPIELBUSCH, in
her official capacity as a Member of the Missouri
Ethics Commission; JEREMIAH W. NIXON, in his official
capacity as Missouri Attorney General; ROBERT P.
McCULLOUGH, in his official capacity as St. Louis
County Prosecuting Attorney.

Appellees,

JOAN BRAY,

Intervenor on Appeal,

COMMON CAUSE,

Amicus Curiae.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: August 21, 1998
 Filed: November 30, 1998

Before BOWMAN, Chief Judge, ROSS and JOHN R. GIBSON, Circuit Judges.

BOWMAN, Chief Judge.

Shrink Missouri Government PAC and Zev David Fredman (collectively, SMG) appeal from the decision of the District Court granting summary judgment to members of the Missouri Ethics Commission, Missouri Attorney General Jay Nixon, and St. Louis County Prosecuting Attorney Robert P. McCullough¹ (collectively, the State) on SMG's challenge to certain provisions of Missouri's campaign finance law. We reverse and remand.

I.

In July 1994, the Missouri legislature, by enacting Senate Bill 650 (SB650), adopted certain amendments to the state campaign finance law that, among other things, restrict the amount of campaign contributions that persons can make to candidates for public office. The limits were to become effective on January 1, 1995. In November 1994, the electorate approved Proposition A, a ballot initiative that imposed even more restrictive contribution limits than those contained in SB650. Proposition A became effective immediately upon voter approval. In December 1995, this Court held that the Proposition A limits on campaign contributions violated the First Amendment. *See Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995),

¹ Although counsel for the prosecuting attorney spells the name of his client differently, we use the spelling as it appeared in the original complaint and as it still appears in the caption of this case.

cert. denied, 518 U.S. 1033 (1996).² At that time, the limits of SB650 became effective.

Under the provisions of SB650 challenged here, "the amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed" \$1,075 to candidates for governor, lieutenant governor, secretary of state, state treasurer, state auditor, or attorney general, or for any office where the population of the electoral district is 250,000 or more; \$525 to candidates for state senator, or for any office where the population of the electoral district is 100,000 or more; and \$275 to candidates for state representative, or for any office where the population of the electoral district is less than 100,000. Mo. Rev. Stat. § 130.032.1 (Supp. 1997) (as amended early in 1998 by the Missouri Ethics Commission to account for inflation, *see* Mo. Rev. Stat. § 130.032.2 (Supp. 1997)).

SMG, a political action committee organized and doing business in Missouri, and Fredman, a resident of and registered voter in Missouri and an unsuccessful candidate for the Republican party's nomination for state auditor this election cycle, filed suit claiming that the limits violate their First Amendment rights of free speech and association. The parties filed cross motions for summary judgment; the District Court denied SMG's motions for summary judgment and for injunctive relief, and granted the State's summary judgment motion. SMG filed a notice of appeal, and on July 27, 1998, we granted SMG's motion for an injunction against enforcement of the campaign contribution limits of SB650 pending appeal.

² We did say in *Carver* that "we generally accept the limits established by the legislature." 72 F.3d at 641. But even if that comment could be construed to mean that the Court believed the SB650 limits to be constitutional (an excessively broad reading, we think), it is *obiter dictum* and is not binding on the Court in this case.

II.

We first address a question initially presented in the last few pages of the State's brief. The State claims that SMG and Fredman lack standing to challenge these contribution limits. We take up the question as our first matter of business, because we lack jurisdiction to entertain the appeal if both SMG and Fredman are without standing.

The State asserts that the injuries alleged are "contrived," "conjectural," and "hypothetical." Brief of Appellees at 49, 50. We disagree. The State cannot make a persuasive argument that SMG and Fredman are not and have not been harmed by the limits imposed on campaign contributions by SB650. See *Shrink Mo. Gov't PAC v. Adams*, No. 98-2351, Order at 3-4 (8th Cir. July 27, 1998) (order granting motion for injunction pending appeal). The only question, as we see it, is whether Fredman continues to have standing despite his loss as a candidate for statewide office in the August primary election. We hold that he does, as the State declined at oral argument to assure the Court that no recourse would be taken against those who, like Fredman, accepted campaign contributions in excess of the SB650 limits after July 27, 1998 (the date we ordered an injunction pending appeal), should the summary judgment be affirmed.

We hold that SMG and Fredman have standing to continue their challenge to the provisions of SB650 here at issue.

III.

We proceed now to the merits, reviewing the decision to grant summary judgment de novo. The question before us is straightforward: do the SB650 limits on political campaign contributions violate SMG's and Fredman's First Amendment rights of free speech and association?

The State insists, as it did in *Carver*, that campaign contribution limits are subject only to intermediate scru-

tiny, not the "rigorous standard of review" employed by the Court in *Buckley v. Valeo*, 424 U.S. 1, 29 (1976) (per curiam). But as we noted in *Carver*, the Supreme Court "articulated and applied a strict scrutiny standard of review" to the federal contribution limits that were under challenge in *Buckley*, and "has not ruled that anything other than strict scrutiny applies in cases involving contribution limits. *Carver*, 72 F.3d at 637; see also *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 294 (1981) ("[R]egulation of First Amendment rights is always subject to exacting judicial review."); *Russell v. Burris*, 146 F.3d 563, 567 (8th Cir.), cert. denied, 67 U.S.L.W. 3332 (U.S. Nov. 16, 1998) (Nos. 98-397, 98-399). The State must demonstrate, therefore, that it has a compelling interest and that the contribution limits at issue are narrowly drawn to serve that interest. See *Buckley*, 424 U.S. at 25; *Russell*, 146 F.3d at 567; *Carver*, 72 F.3d at 638.

A.

The State contends that its compelling interest is in avoiding the corruption or the perception of corruption brought about when candidates for elective office accept large campaign contributions. The State further posits, citing *Buckley*, that corruption and the perception thereof are inherent in political campaigns where large contributions are made, and that it is unnecessary for the State to demonstrate that these are actual problems in Missouri's electoral system. Recent precedent from this Court is to the contrary. In both *Carver* and *Russell*, we were not satisfied with the mere contention that the states have an interest (an indisputably compelling interest, see *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994), cert. denied, 513 U.S. 1127 (1995)) in maintaining the integrity of their elections. We required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place. See *Russell*, 146 F.3d at 568 ("The defendants

must *prove* first that there is real or perceived undue influence or corruption attributable to large political contributions”) (emphasis added); *id.* at 569 (noting that none of the defendants “provided any credible evidence” of actual corruption, nor had they proved a perception of corruption), *Carver*, 72 F.3d at 638.³

In reaching its conclusions concerning the constitutionality of federal campaign contribution restrictions, the *Buckley* Court noted the perfidy that had been uncovered in federal campaign financing in 1972. See 424 U.S. at 27 n.28. But we are unwilling to extrapolate from those examples that in Missouri at this time there is corruption or a perception of corruption from “large” campaign contributions, without some evidence that such problems really exist. See *Russell*, 146 F.3d at 569; *Carver*, 72 F.3d at 638. We will not infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago. The State therefore must prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions.

For its evidence, the State relies on the affidavit of the state senator who co-chaired the Interim Joint Committee on Campaign Finance Reform when the contribution limits were enacted. That senator pointed to no evidence that “large” campaign contributions were being made in

³ On the subject of the State’s burden to prove its compelling interest, this Court in *Carver* quoted (with some alterations by the *Carver* Court) the following passage from *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995), which in turn quoted *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion of Kennedy, J.): “When the Government defends a regulation on speech . . . it must do more than simply ‘posit the existence of the disease sought to be cured.’ . . . It must demonstrate that the recited harms are real, . . . and that the regulation will in fact alleviate these harms in a direct and material way.”

the days before limits were in place, much less that they resulted in real corruption or the perception thereof. See *Buckley*, 424 U.S. at 28 (noting that “the problem of large campaign contributions [is] the narrow aspect of political association where the actuality and potential for corruption have been identified”) (emphasis added). The senator did not state that corruption then existed in the system, only that he and his colleagues believed there was the “real potential to buy votes” if the limits were not enacted, and that contributions greater than the limits “have the appearance of buying votes.” Affidavit of Senator Wayne Goode at ¶ 9. His statement that “[t]he greater the contribution, the greater potential there is for the appearance of and the actual buying of votes,” *id.*, is conclusory and self-serving, given the senator’s vested interest in having the courts sustain the law that emerged from his committee. There is no way for us to tell whether this single legislator’s perception of corruption is the “public perception,” whether it is objectively “reasonable,” and whether it “derived from the magnitude of . . . contributions” that historically have been made to candidates running for public office in Missouri. *Russell*, 146 F.3d at 569.

As a matter of law, the State has failed to come forward with evidence to prove a compelling interest that would be served by the restrictions SB650 imposes on campaign contributions. In fact, the State has been unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest. Therefore, the limits here cannot withstand constitutional challenge.

B.

Even if the State had come forward with evidence sufficient to show that it had a compelling interest in enacting and enforcing campaign contribution limits, it cannot demonstrate that the SB650 limits on the amount of campaign contributions are narrowly tailored to serve that interest. That is, we can say as a matter of law that

the limits at issue here are so small that they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms.

After inflation, limits of \$1,075, \$525, and \$275 cannot compare with the \$1,000 limit approved in *Buckley* twenty-two years ago.⁴ We previously have acknowledged that the Court in *Buckley* did not declare that limits of less than \$1,000 on contributions are unconstitutional per se, but we also recognize that the \$1,000 figure provides us with something of a benchmark. See *Day*, 34 F.3d at 1366. In today's dollars, the SB650 limits appear likely to "have a severe impact on political dialogue" by preventing many candidates for public office "from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Even if the State had demonstrated a compelling interest, the limits set by SB650, absent the State's having proven the actual necessity for such a heavy-handed restriction of protected speech, can only be regarded as "too low to allow meaningful participation in protected political speech and association, and thus . . . not narrowly tailored to serve" the alleged interest. *Day*, 34 F.3d at 1366.

In the circumstances presented here, we do not believe that we run the risk of attempting to "fine tun[e]" the work of the Missouri legislature, or that we otherwise are exercising authority that is not ours in order to hold that these limits are overly restrictive of freedoms protected by the First Amendment. *Buckley*, 424 U.S. at 30. We so conclude because the difference between these limits of

⁴ SMG contends that \$1,075 in 1976 dollars is the equivalent of just \$378 in purchasing power today. The State argues that SMG's use of the Consumer Price Index (CPI) to calculate the effects of inflation on dollars spent for campaign contributions is inappropriate. Nevertheless, the State has not come forward with any other measure it deems more appropriate. In fact, the subsection of SB650 that provides for the biennial adjustment of the contribution limits to account for inflation relies on the CPI for the calculation. See Mo. Rev. Stat. § 130.032.2 (Supp. 1997).

\$1,075, \$525, and \$275, and larger dollar limits that might be constitutionally sound (that is, narrowly tailored to serve a compelling state interest), are not "distinctions in degree" but "differences in kind." *Id.* But see *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir.) (holding that "\$1,000 limitation on direct contributions in connection with local and state elections in Kentucky is not different in kind from the \$1,000 limitation on direct contributions in connection with federal elections upheld in *Buckley*"), *cert. denied*, 118 S. Ct. 162 (1997). Although, like the Court in *Buckley*, we are not prepared to state definitively what difference would be one of "degree" as compared with one of "kind," we can say these limits are overly restrictive as a matter of law. We again remind the State that it has the burden of showing that any limits it places on campaign contributions are narrowly tailored to serve the State's compelling interest in addressing proven "real or perceived undue influence or corruption attributable to large political contributions." *Russell*, 146 F.3d at 568. Once those who would regulate and limit constitutionally protected political speech satisfy their heavy burden of proof, the problem of judicial line-drawing can be expected largely to disappear.

IV.

In sum, the campaign contribution limits at issue in this case, even with the biennial adjustments for inflation that SB650 provides, violate SMG's and Fredman's First Amendment rights of free speech and association. The judgment of the District Court is reversed and the case is remanded with instructions to enter summary judgment for SMG and Fredman.

ROSS, Circuit Judge, concurring.

I concur in the decision to reverse the judgment of the district court and remand for entry of summary judgment for SMG and Fredman. I do so because I agree with

part III A of the majority opinion holding that the State failed to satisfy its evidentiary burden.

However, for the reasons stated by Judge Gibson, I do not join in part III B of Judge Bowman's opinion finding that the contribution limits are different in kind from those approved in *Buckley v. Valeo*, 424 U.S. 1 (1976).

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent.

The Court today departs from the teaching of *Buckley v. Valeo*, 424 U.S. 1 (1976), and gives far too expansive a reading to the recent decisions of this Court in *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), and *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998). Upon a record more slender than the one before us, *Buckley* upheld contribution limits of \$1,000 per election for all federal offices, while Missouri's statute provides a \$1,075 limit for statewide offices. Mo. Rev. Stat. § 130.032 (Supp. 1997). Because I cannot distinguish *Buckley* from the present case, I would uphold the contribution limits at issue.

I.

In *Carver* and *Russell*, we faced graduated annual contribution limits between \$300 for statewide offices and \$100 for other offices, and we held that both statutes violated the First Amendment. *Carver*, 72 F.3d at 641-44, *Russell*, 146 F.3d at 569-71. Both statutes were adopted by initiative petitions.¹ We contrasted these limitations with those at issue in *Buckley*—\$1,000 per election or \$2,000 per election cycle—and found them “different in

¹ The Arkansas statutes in *Russell* had a \$100 limit for all state offices other than the enumerated offices which were elected statewide. *Russell*, 146 F.3d at 565. The provisions at issue in *Carver* contained limitations of \$100 per election cycle for candidates in districts with fewer than 100,000 residents; \$200 for candidates in districts of 100,000 or more residents; and \$300 for statewide candidates. *Carver*, 72 F.3d at 635.

kind.” *Carver*, 72 F.3d at 644, *Russell*, 146 F.3d at 571. For example, we observed that the limitations challenged in *Carver* were the lowest contribution limits in the nation and that the State had presented only meager evidence to justify these limitations. 72 F.3d at 641-42. The holdings of *Carver* and *Russell*, that statewide limits of \$300 per election cycle “differ in kind” from the limit in *Buckley* of \$2,000, point compellingly to a different conclusion in this case.

It is of interest that *Carver* contrasted Proposition A—with limits ranging from \$100 to \$300—to the legislation now before us, with limits then ranging from \$250 to \$1,000. *Id.* at 642-43. In view of the Attorney General's opinion, the dollar limits in Proposition A were the more restrictive and therefore provided the relevant limitation on the plaintiffs' contributions. *Id.* at 634-35. *Carver* struck Proposition A's limits but did not discuss the propriety of the limits now before us. Nevertheless, in contrasting Proposition A's limits with those enacted by the legislature, the similarity between the legislatively-enacted limits and those in *Buckley* was evident.

Less evident is how to distinguish *Buckley* from the present case. When we compare the \$1,075 contribution limit² imposed by Senate Bill 650 for each election with the \$1,000 upheld by *Buckley*, there is simply no difference in kind. The \$1,075 limit applies to statewide races, just as *Buckley*'s \$1,000 limit applies to the Senate, a statewide race, and the presidential elections. *Buckley*'s reasoning would similarly uphold Senate Bill 650's lower contribution limits in non-statewide elections. When one

² The legislation at issue imposes a limit of \$1,075 per election, but a \$2,150 limit per “election cycle.” An “election cycle” is the “period of time from [the] general election for an office until the next general election for the same office.” Mo. Rev. Stat. § 130.011 (Supp. 1995). It is of interest that the average household income in Missouri is about \$31,000 per year.

accounts for the lower number of voters in non-statewide electoral districts, the limits at issue compare favorably with the \$1,000 limit in *Buckley*, which applied to statewide races as well as to elections for the U.S. House of Representatives. There are nine House districts in Missouri, and in the most recent statewide election, the number of votes cast in these districts averaged 235,094. *Official Manual, State of Missouri* 563-65 (1997). Meanwhile, Senate Bill 650 imposes a contribution limit of \$525 upon races for state senators as well as to certain other elections in districts ranging from 100,000 to less than 250,000 in population. Mo. Rev. Stat. § 130.032 (Supp. 1997). There are thirty-five Senate districts in Missouri. Seventeen of these seats were contested in 1996, and an average of 59,254 people voted in each election. *Official Manual, State of Missouri* 566-67 (1997). When the size of the state senatorial districts is contrasted with federal congressional districts as well as the entire State itself, there is plainly no "difference in kind" between these legislative limits and those countenanced by *Buckley*. Finally, the same must be said for the \$275 limit for state House elections. In the last election, the number of votes cast in such districts averaged 12,325. *Id.* at 567-80. With the number of voters in such districts, I cannot conclude that the \$275 limit "differs in kind" from those that *Buckley* upheld. As *Buckley* observed, Congress could have structured limits in a graduated fashion, but its failure to do so did not invalidate the legislation. *Buckley*, 424 U.S. at 30; *Carver*, 72 F.3d at 641. *Buckley* recognizes, then, that graduated limits such as Missouri's are an acceptable solution to the dangers posed by unlimited campaign contributions.

Carver, *Russell*, and Part III B of Chief Judge Bowman's opinion in this case discuss at length the effect of inflation upon the *Buckley* limits. *Carver*, 72 F.3d at 641; *Russell*, 146 F.3d at 570-71. Yet Missouri's statute expressly addresses the inflation problem, and the \$1,000 limit initially enacted has now grown to \$1,075. See Mo.

Rev. Stat. § 130.032.2 (Supp. 1997) (limits adjusted for inflation). Significantly, the campaign expenditures in Missouri's statewide elections have risen markedly since Senate Bill 650's enactment, and there is no basis for rejecting the district court's conclusion that candidates for office remain "able to amass impressive campaign war chests."³

Buckley, of course, did not establish \$1,000 as the constitutional floor for permissible contribution limitations; see *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994). But even if it had, I would reject the argument in Part III B that inflation has dissipated the similarity between the limits in this case and those approved in *Buckley*. Inflation has not undermined *Buckley*'s precedential weight or modified its holding. The \$1,000 limit upheld in *Buckley* remains and is the law today, even though we have used inflation to compare present contribution limitations with those upheld in 1976. See *Carver*, 72 F.3d at 641; *Russell*, 146 F.3d at 570-71; *Day*, 34 F.3d at 1366.⁴ Despite ample opportunity to modify *Buckley*, the Supreme Court has never added the "inflation proviso" that Part III B relies upon. If *Buckley*'s holding must wax and wane with inflation, as Part III B seems to argue, then the very statute that *Buckley* upheld would now be unconstitutional, for inflation alone would render the \$1,000 limit "different in kind" from when the Supreme Court upheld it. Whatever may be the pernicious effects of inflation, I am certain that the First Amendment's dictates do not depend upon the Consumer Price Index.

³ See District Court Memorandum and Order at 15-16, J. App. 191-92; see also J. App. 43-52.

⁴ In all three cases, the limits at issue were patently "different in kind" from the limits in *Buckley*, with or without the aid of inflation. *Carver* and *Russell* struck election cycle limits ranging from \$300 for statewide offices to \$100 for other offices, while *Day* struck a \$100 limit. *Carver*, 72 F.3d at 641-44; *Russell*, 146 F.3d at 569-71; *Day*, 34 F.3d at 1366.

More importantly, even if it were proper to adjust *Buckley* for inflation, Part III B lacks a principled yardstick to assess the constitutionality of *any* contribution limit. Its measure of what "differs in kind" and what "differs in degree" from the *Buckley* limits is standardless and lacks any explanation to support its bald conclusion that the limits at issue are "overly restrictive as a matter of law."⁵

II.

Putting to one side the facial similarity between the statute stricken today and that upheld in *Buckley*, the State has adequately justified the contribution limits at issue. *Buckley* and our cases both teach that contribution limits are subject to "the closest scrutiny." *Buckley*, 424 U.S. at 25; *Carver*, 72 F.3d at 636; *Russell*, 146 F.3d at 567. The State has the burden to demonstrate a compelling interest, which *Buckley* defined as limiting the reality or appearance of political corruption stemming from large financial contributions. 424 U.S. at 26. Both *Carver* and *Russell* found no direct evidence of real or perceived undue influence. *Carver*, 72 F.3d at 642-43; *Russell*, 146 F.3d at 569-70. Accordingly, we struck the contribution limits in both cases.

The present case is readily distinguishable from *Carver* and *Russell*. Although the House and Senate in Missouri preserve no formal legislative history, the record hardly lacks evidence that the statute at issue limits the reality or perception of undue influence and corruption. In summary judgment papers, the State presented an affidavit of Senator Wayne Goode. Goode served twenty-two years

⁵ Indeed, even with the aid of inflation, it does not follow that today's contribution limits "differ in kind" from what the Supreme Court upheld in 1976. Differing costs, whether higher or lower, of new communications media (fax machines, e-mail, and the Internet, as well as more traditional modes of political speech) and modern fund-raising methods (the emergence of "soft money" is but one relevant post-*Buckley* development) simply make comparison a morass of conjecture.

in the Missouri House and nine years in the Senate before he co-chaired the Joint Interim Committee on Campaign Finance Reform that prepared Senate Bill 650, now the statute before us. The senator stated that the Committee heard "a broad spectrum of opinions . . . on the issue of campaign contribution limits." He described the committee discussions of what it costs to run a campaign and the level at which contributions threaten to corrupt political officials and to erode public confidence in the electoral process. The committee heard testimony on the issue of balancing the need to run an effective campaign against the need to limit the potential for buying influence. Balancing the concerns, the committee reached the contribution limits of \$250 to \$1,000 by consensus.⁶ Goode and the other members believed that contributions over those limits create both the appearance that contributors could purchase the votes of elected officials and the danger of actual vote-buying. The most recent elections themselves suggest that the State has limited at least the appearance of corruption in the political process. Goode Affidavit, ¶ 11; J. App. 171. The limits prevent disproportionate funding of particular campaigns and curtail the opportunities for buying political influence. *Id.*

⁶ The Court today attempts to minimize Senator Goode's affidavit as the testimony of a single legislator, but the affidavit contains the Senator's description of the legislature's conclusions, which is precisely the support cited by *Buckley* when it upheld the contribution limits imposed by Congress. *See* 424 U.S. at 27, 28, 30. It must again be emphasized that Goode's observations are those of the co-chair of the joint legislative committee from which the limits at issue originated. To brand his affidavit as "self-serving, given the senator's vested interest in having the courts sustain the law that emerged from his committee" not only rules upon the credibility of a witness on a summary judgment motion, but also gratuitously impugns the senator's description of the evidence before the Committee, the conclusions drawn by the Committee, and his fellow legislators' first-hand knowledge of what it costs to wage a campaign and the dangers presented by contributions above the limits enacted.

This evidence stands in stark contrast to the lack of evidence on these issues in *Carver* and *Russell*.⁷

In addition to the description in Senator Goode's affidavit, what record is available to us reflects that the House and Senate in Missouri exerted considerable effort in reaching accord on the bill finally enacted. Two bills containing contribution limits were introduced in the House, House Bills 1304 and 1523. Senate Bill 801 was introduced and passed in the Senate, and the House passed the House Committee's substitute for Senate Bill 650. A conference committee substitute for the House Committee substitute for Senate Bill 650 was ultimately adopted by the House and Senate and signed by the Governor. This action in both legislative bodies demonstrated the careful attention given to this legislation and the give-and-take before final enactment. We commented upon this process in *Carver*, 72 F.3d at 645 n. 18.

Carver also recited the Supreme Court's admonition that we "must accord substantial deference to the predictive judgments of the legislature." 72 F.3d at 644 (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 665 (1994)). *Turner* referred to the deference owed to Congressional findings. In *Carver*, we left open the question whether state legislatures are due similar deference. *Carver*, 72 F.3d at 644. Although *Carver* rejected the State's argument that we should accord such deference to a citizens' initiative, the limitations now before us became law only after careful and informed deliberation by the legislature. The Court should not so lightly cast aside the legislature's findings in favor of its own. It is hardly counterintuitive that large campaign contributions might corrupt politics and invite public cynicism. The State has imposed only modest restrictions upon political speech, and it need not justify them with scientific precision.

⁷ *Carver* and *Russell* involved only evidence of certain specific contributions, without evidence of their impact, as after-the-fact justifications for the initiative proposals at issue.

The Court's rejection of the description of Senate Bill 650's legislative underpinnings is plainly at odds with *Buckley*. Accepting the argument that the appearance of political corruption could justify the limitations then at issue, *Buckley* stated:

Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . Here, . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

424 U.S. at 27 (quoting *C.S.C. v. Letter Carriers*, 413 U.S. 548, 565 (1973)). It is true that the State must do more than simply "posit the existence of the disease to be cured." See *Carver*, 72 F.3d at 638 (citing *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994) (Kennedy, J., plurality))). The State, by the Goode affidavit, has demonstrated not only the dangers posed by unlimited campaign contributions, but also the conclusions reached as to "alleviat[ing] these harms in a direct and material way." *Id.*

I cannot reconcile the short shrift given the Goode affidavit by the Court today with the Supreme Court's approach in *Buckley*, which cited no actual evidence that large contributions might give rise to the appearance of political corruption and which deferred to what Congress could have reasonably concluded.⁸ See 424 U.S. at 27,

⁸ Although the need to limit the perception of political corruption by itself justifies the contribution limits at issue, today's opinion takes note of what little evidence of actual corruption was before the *Buckley* court: the "perfidy that had been uncovered in

28, 30 (Congress "could legitimately conclude" that avoiding the appearance of corruption is essential to maintaining confidence in government; Congress "was surely entitled to conclude" that disclosure limitations alone would not adequately combat corruption and its appearance; Congress "was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.").

Senate Bill 650 is premised upon just such reasonable legislative conclusions, as evidenced by Senator Goode's affidavit. The Court today rejects those conclusions, which closely resemble those recognized by *Buckley* when it upheld limitations strikingly similar to those now at issue. In rejecting the state's evidence, the Court sidesteps binding Supreme Court precedent and fails to provide meaningful guidance to those who might hope to craft campaign reform legislation that will survive this Court's unprecedented scrutiny.

III.

It must also be noted that the Sixth Circuit has recently approved a Kentucky law with a contribution limit of \$1,000 per election year. *Kentucky Right to Life v. Terry*, 108 F.3d 637, 648 (6th Cir. 1997). The Court creates a conflict between the circuits, and in doing so disregards the inescapable similarity between the legislation that it strikes and that which the Supreme Court upheld.

federal campaign financing in 1972." See *Buckley*, 424 U.S. at 27 n.28. Yet *Buckley*'s passing reference to the 1972 election does not aid this Court's opinion. *Buckley* nowhere supports the particular scrutiny undertaken by the Court today. Certainly, it provides no suggestion that the Goode affidavit would fail to satisfy whatever evidentiary inquiry is required to support a legislative body's conclusion that financial contributions have created or will create the appearance of corruption.

Perhaps members of the Court quarrel not only with the contribution limits at issue today, but with *Buckley* itself, as was made evident during oral argument. We are bound by *Buckley* unless and until the Supreme Court declares otherwise.

I would affirm the summary judgment of the district court upholding the contribution limits in Senate Bill 650.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2351

SHRINK MISSOURI GOVERNMENT PAC,
a political action committee;
ZEV DAVID FREDMAN,
Plaintiffs-Appellants,

v.

RICHARD ADAMS, in his official capacity as a Member of the Missouri Ethics Commission; PATRICIA FLOOD, in her official capacity as a Member of the Missouri Ethics Commission; ROBERT GARDNER, in his official capacity as a Member of the Missouri Ethics Commission; ERVIN HARDER, in his official capacity as a Member of the Missouri Ethics Commission; JOHN HOWALD, in his official capacity as Chairman of the Missouri Ethics Commission; ELAINE SPIELBUSCH, in her official capacity as a Member of the Missouri Ethics Commission; JEREMIAH W. NIXON, in his official capacity as Missouri Attorney General; ROBERT P. McCULLOUGH, in his official capacity as St. Louis County Prosecuting Attorney,
Defendants-Appellees,

JOAN BRAY, a Missouri State Representative; COMMON CAUSE, a non-profit, non-partisan membership corporation organized under the laws of the District of Columbia,
Movants.

Motion for Injunction Pending Appeal

Filed: July 23, 1998

Before BOWMAN, Chief Judge, ROSS and JOHN R. GIBSON, Circuit Judges.

ORDER

On May 12, 1998, the District Court¹ upheld Missouri's \$275, \$525, and \$1,075 limits on campaign contributions. *See Shrink Mo. Gov't PAC v. Adams*, No. 4:98CV357, Memorandum and Order (E.D. Mo. May 12, 1998) (upholding provisions of Mo. Ann. Stat. § 130.032 (West Supp. 1998)). On May 14, 1998, plaintiffs Shrink Missouri Government PAC (SMG) and Zev David Fredman appealed from that judgment. They seek an injunction during the pendency of their appeal.

To be entitled to an injunction pending appeal, appellants must meet the requirements outlined in *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). Under *Dataphase*, they must show (1) the likelihood of success on the merits; (2) the likelihood of irreparable injury to appellants absent an injunction; (3) the absence of any substantial harm to other interested parties if an injunction is granted; and (4) the absence of any harm to the public interest if an injunction is granted. 640 F.2d at 114; *see also Hilton v. Braunskill*, 481 U.S. 770, 771 (1987). *Fargo Women's Health Org. v. Schafer*, No. 93-1579 (8th Cir. Mar. 30, 1993), *reprinted in Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 538 (8th Cir. 1994) (appendix). Having considered the briefing supplied by appellants in support of their motion and

¹ The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

by the state appellees in opposition thereto, we conclude that all four factors support the entry of an order enjoining appellees from enforcing the challenged campaign contribution limits pending a final determination by this Court.²

The most important of the *Dataphase* factors is the appellants' likelihood of success on the merits. In view of our prior case law, including *Russell v. Burris*, Nos. 97-3922/4033/4038, slip op. (8th Cir. June 4, 1998), we conclude there is a strong likelihood that appellants will prevail when the case is heard on the merits. All campaign contribution limits restrict political speech, and thus they implicate the First Amendment. We are particularly concerned that it seems likely the state has failed in its burden of proof to show "that there is real or perceived undue influence or corruption attributable to large political contributions . . . and . . . that [the contribution limits] are narrowly tailored to address that reality or perception." *Id.* at 10-11. Similarly, we think it is likely the state has failed to show "that a reasonable person could perceive, on the basis of the evidence presented at trial, that such contributions make for undue influence or spawn corruption." *Id.* at 11. We note that the campaign contribution limits here at issue are, after adjustment for inflation, dramatically lower than the \$1,000 limit upheld in *Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976), and do not appear to be narrowly tailored to address any legitimate interest in avoiding corruption or the appearance of corruption.

The other three *Dataphase* factors also support an injunction pending appeal. Without an injunction pending our final decision, SMG and Fredman likely will suffer

² This Court will reach the merits of the case on an expedited basis. An accelerated briefing schedule has been established requiring all briefing to be completed by August 10, 1998, and oral argument has been set for August 21, 1998 in Kansas City. A final decision on the merits will not be long delayed.

immediate and irreparable harm to their First Amendment rights because the primary election for which Fredman is a candidate will be held on August 4, 1998. SMG has contributed \$1,075, the maximum sum permitted under the challenged Missouri statutes, to the "Fredman for Auditor" committee, and any additional contribution would run afoul of the criminal and civil sanctions imposed by those statutes. Fredman has accepted SMG's \$1,075 contribution. He would accept additional contributions in excess of this amount but for the sanctions imposed for violations of the challenged Missouri statutes. The contribution limits thus work to restrict SMG in the promotion of its political viewpoints and in its expression of support for candidates who share its political goals. Likewise, the limits work to restrict Fredman from garnering the sums necessary to promote his campaign for state auditor and to deliver his political message.

Concerning the question of substantial harm to other interested parties if an injunction is granted, we are unable to discern any such harm. An order enjoining enforcement of the challenged Missouri campaign contribution limits merely restores the situation that existed before 1994 when the state did not limit campaign contributions. Finally, we believe the public interest in free political speech weighs heavily in favor of enjoining the challenged contribution limits pending this Court's final determination on the merits.

For the reasons stated, the motion for an injunction pending appeal is granted. Appellees are enjoined from enforcing the challenged campaign contribution limits pending a final decision by this Court on the merits of the case.

A true copy,

Attest: /s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. MISSOURI
EASTERN DIVISION

No. 4:98CV357 CDP

SHRINK MISSOURI GOVERNMENT PAC, *et al.*,
Plaintiffs,

v.

RICHARD ADAMS, *et al.*,
Defendants.

May 12, 1998

MEMORANDUM AND ORDER

PERRY, District Judge:

This case draws into question the validity of Missouri's limits on contributions to candidates for state elected office. Contending that those limits violate their first amendment rights, plaintiffs seek an injunction preventing enforcement of the following provisions of Senate Bill 650, codified at Mo. Ann. Stat. § 130.032 (West Supp. 1998):

1. Provisions that limit "the amount of contributions made by or accepted from any person other than the candidate in any one election" to a maximum of (a) \$1,075.00 to elect an individual to the offices of governor, lieutenant governor, secretary

of state, state treasurer, state auditor, or attorney general, or any other office if the population of the relevant electoral unit is at least 250,000, (b) \$525.00 to elect an individual to the office of state senator or any other office if the population of the relevant electoral unit is at least 100,000 but less than 250,000, (c) \$275.00 to elect an individual to the office of state representative or any other office if the population of the relevant electoral unit is less than 100,000. *See* Mo. Ann. Stat. § 130.032.1.

2. A provision adjusting the above-mentioned limits for inflation. Mo. Ann. Stat. § 130.032.2.
3. A provision making "candidate committees, exploratory committees, campaign committees and continuing committees, other than those continuing committees which are political party committees" subject to the above-mentioned limits. Mo. Ann. Stat. § 130.032.3.
4. A provision imposing on committees found in violation of the above-mentioned limits a penalty of an amount equal to the nonallowable contribution plus a \$1,000 surcharge per such nonallowable contribution. Mo. Ann. Stat. § 130.032.7.

On March 4, 1998, the Court heard oral argument from all parties on plaintiffs' motion for a temporary restraining order. The Court denied the motion on March 9, concluding that on the record before it, plaintiffs had failed to show a likelihood of success on the merits or that the balance of harms and public interest weighed in their favor. *See Dataphase Sys., Inc. v. C L Sys.*, 640 F.2d 109 (8th Cir.1981) (en banc).

On March 18, the Court entered a case management order. In that order, the Court, generally adopting a proposal jointly submitted by the parties, established an ex-

pedited briefing schedule for dispositive motions. In accordance with that schedule, the parties have filed cross-motions for summary judgment. Based on the undisputed facts and the relevant case law, the Court concludes that defendants are entitled to judgment as a matter of law. It will enter judgment accordingly, and will deny plaintiffs' motion for injunctive relief.¹

I. Background

This action comes as the perhaps inevitable consequence of the Eighth Circuit's 1995 decision in *Carver v. Nixon*, 72 F.3d 633 (8th Cir.1995), *cert. denied*, 518 U.S. 1033, 116 S.Ct. 2579, 135 L.Ed.2d 1094 (1996), a case that invalidated the campaign contribution limits contained in Proposition A, an initiative passed by the Missouri electorate in the November 1994 election. Proposition A placed "per election cycle"² limits on contributions by individuals or committees (other than candidate committees) to a candidate or his or her candidate committee. Those limits were as follows: (1) \$100 per candidate in districts with fewer than 100,000 residents, (2) \$200 per non-statewide candidate in districts of 100,000 or more residents, and (3) \$300 per statewide candidate (i.e., candidates seeking election to the office of Governor,

¹ Given its disposition of this matter, the Court believes that it need not reach defendant Robert P. McCullough's motion to dismiss or, in the alternative, to join as necessary and indispensable parties all prosecutors in the state of Missouri. For the same reason, the Court will deny as moot the motion of Joan Bray to intervene as a defendant and the motion of Common Cause to participate as *amicus curiae*.

² An election cycle includes both the primary and the general election. See Mo. Ann. Stat. § 130.011(16) (West 1997); *Carver*, 72 F.3d at 635 n. 3. A 1997 amendment to § 130.011 deleted the definition of "election cycle." See Mo. Ann. Stat. § 130.011 (West Supp.1998). The limits contained in § 130.032 (i.e., the statute at issue here), unlike those of Proposition A, apply on a per election basis. See Mo. Ann. Stat. § 130.032 (West Supp.1998).

Lieutenant Governor, Attorney General, Auditor, Treasurer, and Secretary of State).

Prior to the November 1994 election, the Missouri General Assembly enacted a campaign finance law, known as Senate Bill 650, which contained the campaign contribution limits set forth in the first paragraph of this memorandum. Senate Bill 650's limits were to take effect on January 1, 1995. After Proposition A's passage, however, the Missouri attorney general determined that the initiative's lower limits controlled.

Following the attorney general's determination, Carver, a political contributor, brought suit to enjoin Proposition A's enforcement, arguing that the law unconstitutionally interfered with his ability to support political candidates. The district court denied the injunction, *Carver v. Nixon*, 882 F.Supp. 901 (W.D.Mo.1995), and the Eighth Circuit reversed. The court of appeals concluded that the district court had erred in extending the Supreme Court's holding in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), "to the infinitely broader interest of limiting all, not just large, campaign contributions,"³ 72 F.3d at 639. Quoting the Supreme Court's decision in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981), the court stated, "'Buckley identified a single narrow exception to the rule that limits on political activity were

³ In *Buckley*, the Supreme Court, applying a strict scrutiny standard of review, held that provisions of the Federal Election Campaign Act ("FECA") establishing a \$1,000 limitation on contributions to campaigns for federal elected office were constitutional. In upholding the limitation, the Court noted that limiting the amount a person may give to a candidate "involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by the contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." 424 U.S. at 21, 96 S.Ct. 612. FECA's limits remain unchanged to this day. See 2 U.S.C. § 441a.

contrary to the First Amendment. The exception relates to the perception of undue influence of *large contributors to a candidate . . .*" *Carver*, 72 F.3d at 638 (quoting 454 U.S. at 296, 102 S.Ct. 434) (emphasis added by the *Carver* court).

Describing Proposition A's limits as "dramatically lower" than those approved in *Buckley*, *id.* at 641-42, and lower, in fact, than those of any other state, *id.* at 642, the *Carver* court concluded that the initiative's limits were "not closely drawn to reduce corruption or the appearance of corruption associated with large campaign contributions." *Id.* at 644. The court found the following factors relevant: (1) after adjusting for inflation, Proposition A's limits represented between two and six percent of the \$2,000 per election cycle limit approved of in *Buckley*, *id.*, at 642 n. 8,⁴ (2) other states had larger contribution limits, *id.* at 641-42, (3) Senate Bill 650 provided a "back-up" in the event of Proposition A's invalidation, *id.* at 642 ("The question is not simply that of some limits or none at all, but rather Proposition A as compared to those in Senate Bill 650 . . ."),⁵ and (4) the impact of Proposition A's limits affected a much higher percentage

⁴ In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), the Eighth Circuit enunciated the principle that the effect of inflation should be considered in determining the constitutionality of campaign contribution limits. The *Day* court invalidated a Minnesota statute limiting contributions to and from political committees to \$100. While recognizing that "the *Buckley* limit was never declared to be a constitutional minimum," *id.* at 1366, the court observed that "a \$100 contribution in 1976 [the year that *Buckley* was decided] would have a value of \$40.60 in 1994 dollars, or approximately four percent of the \$1,000 limit approved in *Buckley*." *Id.*

⁵ In dicta, the court appeared to endorse Senate Bill 650's limits. See 72 F.3d at 641 ("[W]e generally accept the limits established by the legislature."); see also *id.* at 645 (stating that there are "substantial reasons for according deference to legislative enactments that do not exist with respect to proposals adopted by initiative").

of contributors than did the federal \$1,000 limit. *Id.* at 643. As a result of the *Carver* decision, Proposition A's limits were supplanted by those contained in Senate Bill 650.

II. Facts

Plaintiff Shrink Missouri Government PAC ("Shrink PAC") is a political action committee. Plaintiff Zev David Fredman is a candidate in the August 1998 Republican primary for the office of Missouri state auditor. Fredman, who has never before run for statewide political office, has formed a candidate committee ("Fredman for Auditor"), filed for office, and paid the required filing fee. The defendants in this matter are the Missouri Ethics Commission's chairman (John Howald) and members (Richard Adams, Patricia Flood, Robert Gardner, Ervin Harder, and Elaine Spielbusch), who are responsible for administering the provisions of the Missouri campaign finance laws, the state attorney general (Jeremiah W. Nixon), who advises the ethics commission and enforces the campaign finance laws, and the prosecuting attorney of St. Louis County (Robert P. McCullough), who is also responsible for enforcing those laws.

Shrink PAC raises money from Missouri voters and contributes those funds to candidates for Missouri elective office. It made contributions to certain of those candidates in the 1994, 1996, and 1997 elections. On June 23, 1997, it made a \$1,025 contribution to "Fredman for Auditor," and made an additional \$50 contribution on February 25, 1998. Shrink PAC states that but for Missouri's campaign contribution limitations, it would make additional contributions to Fredman's campaign. Fredman believes that he can wage an effective campaign for auditor only if he can garner contributions in excess of those provided for under current Missouri law.

III. Discussion

In determining whether summary judgment should issue pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a court views the facts and any inferences to be drawn therefrom in the light most favorable to the non-moving party. The moving party bears the burden of both establishing the absence of a genuine issue of material fact and showing that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In this case, the facts are undisputed. The issue is purely legal: do Missouri's limits on campaign contributions violate the first amendment?

It is firmly settled that regulation of first amendment rights is "always subject to exacting judicial review." *Citizens Against Rent Control*, 454 U.S. at 294, 102 S.Ct. 434. "Exacting review" means "strict scrutiny." A court must strike a challenged regulation that is not "narrowly tailored to achieve a compelling governmental interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *Carver*, 72 F.3d at 638.

Plaintiffs argue that defendants must demonstrate that campaign contributions in excess of the statutory limits cause some "real harm," i.e., that such contributions cause either corruption or the appearance of corruption. If a showing of "real harm" is required (the state claims it is not), the Court finds that defendants here have made that showing.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 231, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989). Defendants claim that contributions exceeding the statutory limits create a perception that the individuals or entities mak-

ing those contributions are attempting to curry favor with the state's elected officials. Eliminating or at least limiting that perception is a compelling governmental interest, as *Buckley* makes clear. See *Buckley*, 424 U.S. at 27, 96 S.Ct. 612. As Missouri does not collect or preserve legislative history, it is obviously impossible for defendants to supply a contemporaneous account of the reasoning and motivations behind Senate Bill 650. They have, however, provided evidence in the form of an affidavit from the state senator who co-chaired the Interim Joint Committee on Campaign Finance Reform at the time of Senate Bill 650's passage. In that affidavit, the senator stated that the committee "heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence." He further testified to his belief that contributions in excess of the limits set by Missouri "have the appearance of buying votes as well as the real potential to buy votes."⁶

A perception of influence peddling is "real harm" regardless of whether such peddling is actually afoot. *Buckley*, 424 U.S. at 27, 96 S.Ct. 612 ("Of almost equal concern as the danger of actual *quid pro quo* arrange-

⁶ Newspaper stories and editorials from the same period tend to support the senator's statements. See, e.g., Jo Mannies, Auditor Race May Get Too Noisy To Be Ignored, *St. Louis Post-Dispatch*, Sept. 11, 1994, at 4B (reporting that Republican candidate for Missouri state auditor received a \$40,000 contribution from a St. Louis-based brewery and \$20,000 from a St. Louis bank); John A. Dvorak, Election Reform Backed Lid on Contributions to Campaigns Wins Carnahan's Support, *Kansas City Star*, Nov. 14, 1993, at B1 (quoting Governor Mel Carnahan as stating, "We need a system that will make sure that our democratic institutions care as much about John Doe and Jane Doe as they do about any big company or any wealthy individual"); Editorial, The Central Issue is Trust, *St. Louis Post-Dispatch*, Dec. 31, 1993, at 6C (observing that Missouri state treasurer's choice of Central Trust Bank of Jefferson City to handle most of the state's banking business raised an appearance of favoritism, as the treasurer had accepted approximately \$20,000 from the same bank in his 1992 election campaign).

ments is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large financial contributions.”). To the extent Citizen Smith thinks that an elected official is giving Citizen Jones preferential treatment based on the latter’s largess in the most recent election, the confidence of Citizen Smith in the integrity of her government is diminished. The Court does not believe that polling the citizenry is required in order to demonstrate that the integrity of a state’s election process is facing a perceived threat.⁷ As the recipients of campaign contributions, members of the legislature are uniquely qualified to gauge whether allowing those contributions to go unchecked endangers our democratic system of government, and, if so, to prescribe an appropriate remedy therefor. As the Supreme Court has observed, “Sound policymaking

⁷ In some sense, the vote on Proposition A might be viewed as such a poll. The initiative was depicted by the media as an attempt to “temper the influence of special interests and put political newcomers on a more level playing field at election time.” Kevin Q. Murphy, Low-key Proposition A Would Refashion Election Financing, *Kansas City Star*, Oct. 27, 1994, at A1; Editorial, Four Proposals on the Missouri Ballot, *St. Louis Post-Dispatch*, Oct. 20, 1994, at 6B (“Proposition A would make further improvements to control influence-buying in elections that lawmakers were not willing to impose on themselves.”); Voters Guide, *St. Louis Post-Dispatch*, Nov. 6, 1994, at 8 (describing Proposition A’s goal as “limit[ing] the influence of special interests in government by putting low ceilings on how much anyone can give to a political candidate”). If the media’s views are at all reflective of those of the public at large, then the fact that Missouri’s voters voted for Proposition A in rather over-whelming numbers (the initiative was supported by seventy-four percent of those voting) is some indication that they shared those views. See Kathy Richardson, Letter to the Editor, *St. Louis Post-Dispatch*, Nov. 5, 1994, at 16 (describing political system as “money-influenced” and urging other citizens to vote for Proposition A); Robyn Steely, Editorial, Money and State Senators, *St. Louis Post-Dispatch*, Aug. 21, 1994, at 3B (claiming that “business interests, large contributions, war chests, inadequately disclosed information and myths about campaign financing all taint our democratic process”).

often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.” *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); see also *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986) (“Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.”); *Bullock v. Carter*, 405 U.S. 134, 145, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (“Although we have no way of gauging the number of candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the State in avoiding overcrowded ballots.”). Even for one unschooled in politics, no great deductive leap is required to reach a conclusion that the contribution of substantial sums to a candidate for political office gives rise to a perception among the public that the contributor is trying to curry favor with the recipient.⁸ See

⁸ In *Carver*, the Eighth Circuit held that evidence of a political action committee’s \$420,000 contribution could not support the state’s claim that Proposition A’s contribution limits were narrowly tailored. See 72 F.3d at 642. However, under *Buckley*, that same evidence would support a showing of “real harm.” As the *Carver* court noted, the Supreme Court in *Buckley*, in discussing large contributions, “specifically referred to disturbing examples surfacing after the 1972 election” that had been cited by the D.C. Circuit. 72 F.3d at 638 (citing 424 U.S. at 27, 96 S.Ct. 612). Those examples included a dairy industry pledge of two million dollars in support of President Nixon’s re-election campaign, presidential campaign contributions totaling \$1.8 million from thirty-one individuals holding ambassadorial appointments from President Nixon, and an additional three million dollars from six individuals seeking such appointments from the president. See *Buckley v. Valeo*, 519 F.2d 821, 839-40 and nn.36-38; *Buckley*, 424 U.S. at 27 n. 6, 96 S.Ct. 612 (citing the portion of the D.C. Circuit’s opinion just mentioned);

Turner Broad., 512 U.S. at 666, 114 S.Ct. 2445 (“[W]hen trenching on first amendment interests . . . , the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures.”) (quoting *Century Communications Corp. v. F.C.C.*, 835 F.2d 292, 304 (D.C.Cir.1987)); *Burson v. Freeman*, 504 U.S. 191, 207, 112 S.Ct. 1846, 119 L.Ed. 2d 5 (1992) (describing the link between ballot secrecy and a restriction on the display or distribution of campaign materials near polling places as one of “common sense”). Plaintiffs’ contention that defendants have not shown “real harm” must fail.

Plaintiffs appear to be implying that the Supreme Court’s decision in *Buckley* no longer sits on a firm foundation. But, the case upon which plaintiffs most heavily rely, *Colorado Republican Fed’l Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996), simply does not support that proposition. The Court in *Colorado Republican* held that the first amendment prohibits applying a federal statutory limit on a political party’s expenditures made “in connection with” a general election congressional campaign to a political party’s expenditure that is made without coordination with any candidate. 116 S.Ct. at 2312. In announcing its decision, the Court issued four separate opinions: Justice Breyer announced the Court’s judgment and authored an opinion joined by Justices O’Connor and Souter; Justice Kennedy (joined by Chief Justice Rehnquist and Justice Scalia) wrote an opinion concurring in the judgment and dissenting in part; Justice

Carver, 72 F.3d at 638 n. 5 (same). Although all of those examples involved contributions far in excess of \$1,000, the Supreme Court nevertheless rejected the appellants’ objection that the \$1,000 restriction was “unrealistically low because much more than that amount would still not be enough to exercise improper influence over a candidate or office-holder, especially in campaigns for state-wide or national office.” 424 U.S. at 30, 96 S.Ct. 612.

Thomas (joined, in part, by Chief Justice Rehnquist and Justice Scalia wrote a separate opinion concurring in the judgment and dissenting in part); and Justice Stevens (joined by Justice Ginsburg) filed a dissenting opinion. All four authors discussed *Buckley*, and three of them (representing a total of eight justices) implicitly endorsed its holding. See *id.* 116 S.Ct. at 2315 (“Beginning with *Buckley*, the Court’s cases have found a ‘fundamental constitutional difference between money spent to advertise one’s views independently of the candidate’s campaign and money contributed to the candidate to be spent on his campaign.”) (opinion by Breyer, J.); *id.* 116 S.Ct. at 2321 (“[I]t is true that contributions can be restricted consistent with *Buckley*. . . .”) (opinion by Kennedy, J.); *id.* 116 S.Ct. at 2332 (“It is quite wrong to assume that the net effect of limits on contributions . . . will be adverse to the interest in informed debate protected by the First Amendment.”) (opinion by Stevens, J.). Only Justice Thomas, in a section of his opinion that neither Chief Justice Rehnquist nor Justice Scalia joined, urged that *Buckley* be overruled. *Id.* 116 S.Ct. at 2325 (expressing belief that the distinction between expenditures and contributions “lacks constitutional significance”) (opinion by Thomas, J.). In sum, then, *Buckley*’s holding is still sound.

Plaintiffs also argue that Missouri’s campaign contribution limits are not “narrowly tailored.” As mentioned above, the Eighth Circuit in *Day* strongly implied that the impact of inflation should be taken into account in determining whether a given limit on campaign contributions passes first amendment muster. See 34 F.3d at 1366. *Carver* reiterated that concern: “Our observation in *Day* about the effect of inflation applies with equal force in this case.” 72 F.3d at 641. Citing those two decisions, plaintiffs claim that contribution limits must be adjusted for inflation, and that, so adjusted using the

Consumer Price Index ("CPI"), \$1,075 today is the equivalent of only \$378 in 1976.⁹

In holding that a \$100 limit on contributions to and from political committees was "too low to allow meaningful participation in protected political speech and association," 34 F.3d at 1366, the court in *Day* noted that the \$1,000 ceiling upheld in *Buckley* was not a "constitutional minimum," *id.*, a statement which *Buckley* emphatically supports. As the *Buckley* Court observed, "The quantity of communication by the contributor does not increase perceptibly with the size of his contribution. . . . At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." 424 U.S. at 21, 96 S.Ct. 612. As noted *supra*, the Court rejected a claim that the \$1,000 ceiling was overly broad in that "much more than that amount would still not be enough" for an unscrupulous contributor to exercise improper influence. *Id.* at 30, 96 S.Ct. 612. Quoting the D.C. Circuit's opinion in *Buckley*, the Court stated, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe whether, say, a \$2,000 ceiling might not serve as well as \$1,000." *Id.* at 30, 96 S.Ct. 612 (quoting 519 F.2d at 842). The Court concluded, "Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* A "difference in kind" might arise, the Court suggested, if the limitation at issue "prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* 424 U.S. at 21, 96 S.Ct. 612. In approving FECA's contribution ceiling, the Court noted that it did not reduce "the total amount of money potentially available to promote political expression," *id.* at 22, 96 S.Ct. 612, but, instead,

⁹ Likewise, \$525 today is the equivalent of \$184.80 in 1976, and \$275 the equivalent of \$96.70 in 1976.

"merely . . . require[d] candidates and political committees to raise funds from a greater number of persons and to compel [would-be big donors] to expend [their] funds on direct political expression." *Id.*

The Court finds that the effect of inflation since *Buckley* was decided has not created a "difference in kind" between a \$1,000 contribution in 1976, and a \$1,075 contribution in 1988.¹⁰ First, the evidence shows that despite Missouri's contribution limits, candidates for state elected office are still quite able to raise funds sufficient to run effective campaigns. For example, in the 1992 race for secretary of state, expenditures by the seven candidates totaled \$646,749.53 (including both the primary and the general elections). In the 1996 race for that office, the three candidates spent a total of \$1,819,052.69. Likewise, in the 1992 race for lieutenant governor the six candidates spent \$1,974,066.33, as compared to the \$1,001,219.08 spent by the two candidates for the same office in 1996. Despite Missouri's contribution limits, candidates for political office in the state are still able to amass impressive campaign war chests.¹¹

¹⁰ Shrink PAC claims that the federal limit applicable to it is \$5,000. However, the \$5,000 limit applies only to "multicandidate" political committees. 2 U.S.C. § 441a(2). In order to qualify as such a committee, an entity must, *inter alia*, have received contributions from more than fifty persons and made contributions to five or more candidates for federal office. *Id.* at § 441a(4). Shrink PAC has provided no evidence that it meets any of those criteria.

¹¹ In *Carver*, the court indicated that an examination of the contribution limits imposed by other states was appropriate in determining whether Missouri's ceilings were "narrowly tailored." 72 F.3d at 641-42. In striking Proposition A, the court observed that the initiative would give Missouri "the lowest contribution limits in the nation." *Id.* at 642. Such is not the case with § 130.032. *See, e.g.*, Alaska Stat. § 15.13.070(c)(1) (Michie 1996) (\$1,000 per year limit on contributions to a candidate by a group other than a political party); Ariz.Rev.Stat. Ann. § 16-905 (West Supp.1997) (\$750 per election limit on contributions from a single political

In striking the \$100 contribution limit at issue in *Day*, the Eighth Circuit expressed concern that between one-fourth and one-third of the contributions made by one of the plaintiffs therein exceeded that amount in the most recent election cycle. 34 F.3d at 1366. Similarly, in *Carver*, the court observed that "in the 1994 Auditor's race, 19.5 percent of the contributors gave more than the \$300 Proposition A limit, but less than the \$1,000 Senate Bill 650 limit," and that "in the State Representative race, 19.0 percent of the contributors gave more than the \$100 Proposition A limit, but less than the \$250 Senate Bill

committee to a candidate for statewide office, \$300 if non-statewide); Conn. Gen.Stat. § 9-333q(a) (1997) (\$1,500 per election limit on contributions to a candidate for lieutenant governor, secretary of state, treasurer, comptroller, or attorney general, \$500 for candidates for state senator, \$250 for candidates for state representative); Del.Code Ann. tit. 15, § 8010(a) (1993) (\$1,200 limit per "election period" limit on contributions to a candidate for statewide office, \$600 if non-statewide); Fla. Stat. Ann. § 106.08(1)(a) (West Supp.1998) (\$500 per election limit); Ky.Rev.Stat. Ann. § 121.150 (6) (Banks-Baldwin 1998) (\$1,000 per election limit); Me.Rev. Stat. Ann. tit. 21-A, § 1015.2 (West Supp.1997) (\$250 per election limit effective January 1, 1999, on contributions to non-gubernatorial candidates); Minn.Stat. Ann. § 10A.27.1(c) (West 1997) (\$500 per election year limit on contributions to candidates for the office of secretary of state, state treasurer, or state auditor); Or.Rev.Stat. § 260.160(1) (1997) (\$500 per election limit on contributions to statewide candidates, \$100 if non-statewide); S.D. Codified Laws § 12-25-1.1 (Michie 1995) (\$1,000 per year limit on individual contributions to a single candidate for state-wide office, \$250 if non-statewide); Vt. Stat. Ann. tit. 17, § 2805(a) (1997 Supp.) (effective November 14, 1998, \$200 per election limit on contributions from a political committee to a candidate for state representative, \$300 to a candidate for state senator, \$400 to a candidate for governor, lieutenant governor, secretary of state, auditor of accounts, or attorney general); see also Ann. Laws of Mass. ch. 55, § 6A (Lexis 1998 Supp.) (annual limit of \$37,500 on total contributions that may be made by political action committees to candidates for state secretary, state treasurer, and state auditor, \$18,750 for candidates for state senator, \$7,500 for candidates for state representative).

650 limit." 72 F.3d at 643; see also *Buckley*, 424 U.S. at 21 n. 23 ("Statistical findings agreed to by the parties reveal that approximately 5.1% of the \$73,483,613 raised by the 1,161 candidates for Congress in 1974 was obtained in amounts in excess of \$1,000."). According to data produced by defendants, of the 1,973 contributors to candidates for state auditor in the 1994 general election, 1,926 (or 97.62 percent) made aggregate contributions of \$2,000 or less. Only forty-seven of the 1,973 (or 2.38%) made aggregate contributions of more than \$2,000. Similarly, in the 1992 general election for secretary of state, less than 1.5% of the contributors made aggregate contributions exceeding \$2,000. Thus, there is no reason to believe that Missouri's contribution limits have any "dramatic adverse effect" on funding campaigns for state office.¹² See *id.* 424 U.S. at 21, 96 S.Ct. 612.

Last but not least, the Court does not believe that invalidating Missouri's contribution limits would be consistent with *Buckley*. It is clear from Eighth Circuit precedent that *Buckley* controls the issues in this case. See *Carver*, 72 F.3d 633. And it is also clear, plaintiffs' suggestions to the contrary notwithstanding, that *Buckley* remains good law. Therefore, to hold that in the context of contribution limits on state elections, the monetary limits approved of in *Buckley* are invalid would, in the Court's view, constitute an indirect—but still improper—overruling of that decision. Missouri's statute, unlike FECA, already does take inflation into account. It specifically requires that the contribution limits prescribed therein "shall be increased on the first day of January in each even-numbered year by multiplying the base year amount [defined as the contribution limits effective on January 1, 1995] by the cumulative consumer price index

¹² Under *Colorado Republican*, of course, Shrink PAC is free to expend funds in support of Fredman without regard to § 130.032's limits, so long as no coordination between the committee and the candidate takes place.

... for all years since January 1, 1995.”¹³ Mo.Rev.Stat. § 130.032.2. Does the Constitution require Missouri to do more, especially given that FECA contains no provision adjusting for inflation the limits approved of in *Buckley*? The Court believes the answer to that question is no.

Certainly, taking account of inflation makes economic sense in theory, but it may be substantially more difficult in practice. For example, is using the CPI really the appropriate method? After all, the CPI cannot, by definition, reflect increases in the cost of non-consumer services such as conducting a mass-mailing, operating a telephone bank, or running a thirty-second radio or television advertisement. And if some or all of these costs have risen, perhaps they are offset, at least to some degree, by post-1976 technological advances such as the fax machine, e-mail, and the Internet (a candidate might, for example, be able to cheaply and effectively promulgate his or her views by creating a web page). Should not such cost-reducing innovations affect the inflation calculus?

The Court further observes that neither the *Day* panel nor the *Carver* panel held that inflation was the *only* factor to be considered. Indeed, because the state’s “compelling interest” encompasses a desire to avoid even the perception of corruption, it might well be pertinent to inquire whether the average Missourian views \$1,000 as a large or small amount. In this regard, the Court notes that the median income of a Missouri household in 1994 was \$31,046, an amount that, in constant 1995 dollars, was actually less than it had been nine years earlier (\$31,073 in 1985). See Statistical Abstract of the United States 468 (117th ed.1997). The Court suspects that the head of a family earning less than \$32,000 would certainly consider “large” a political contribution in excess of \$1,075.

¹³ In accordance with that provision, the Missouri Ethics Commission adjusted Missouri’s limits effective January 1, 1998.

In the end, perhaps this analysis illustrates what the *Buckley* Court meant when it said that a judge has “no scalpel to probe,” whether a \$1,000 or a \$2,000 contribution ceiling would be more appropriate. 421 U.S. at 30, 95 S.Ct. 1365; see also *id.* (declaring that Congress’s failure to structure FECA’s contribution limitations to take account of the graduated expenditure limitations for congressional and presidential campaigns “does not invalidate the legislation”). While it is undoubtedly true that \$1,000 today will not buy what it did in 1976, a court analyzing whether a given statute comports with the first amendment must hesitate before “imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems.” *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 116 S.Ct. 2374, 2385, 135 L.Ed.2d 888 (1996). There is more than ample reason to defer to the considered judgment of the Missouri legislature here.

Accordingly,

IT IS HEREBY ORDERED that defendants’ motion for summary judgment [#21] is granted, and that plaintiffs’ motions for summary judgment [#24] and for a preliminary injunction [#5] are denied.

IT IS FURTHER ORDERED that defendant Robert P. McCullough’s motions to dismiss pursuant to Fed.R. Civ.P. 21 [#19] and to join as necessary and indispensable parties all prosecutors in the state of Missouri [#20] are denied as moot.

IT IS FURTHER ORDERED that defendant Robert P. McCullough’s motion to join in the various filings made by the state defendants in this case [#27] is granted.

IT IS FURTHER ORDERED that Joan Bray’s motion to intervene as a defendant [#29] and Common Cause’s motion for leave to participate as amicus curiae are denied as moot.

APPENDIX D

All limits are for statewide candidates unless otherwise specified. ALASKA STAT. § 15.13.070(c)(1) (Supp. 1997). (\$500 per year on contributions by individuals and \$1000 per year on contributions by groups other than political parties); ARIZ. REV. STAT. ANN. § 16-905 (West Supp. 1997) (\$760 per election); ARK. CODE ANN. § 7-6-203(a) (Michie Supp. 1995) (\$1000 per election for statewide candidates), *see also*, *Russell v. Burris*, 978 F.Supp. 1211, 1229 (E.D. Ark. 1997) (subsequently enacted lower limit found unconstitutional but severable so that \$1000 limit continued to apply), *aff'd* in pertinent part *Russell v. Burris*, 146 F.3d 563 (8th Cir.), *cert. denied* 1998 WL 635679 (Nov. 16, 1998); CAL. GOV'T CODE §§ 85301(c), 85402 (West Supp. 1997) (\$500 per election, increased to \$1000 for candidates agreeing to expenditure limits), *see also*, *California Prolife Council Political Action Committee v. Scully*, 989 F.Supp. 1282, 1292-1300 (E.D. Cal. 1998) (limit found unconstitutional based on evidence that it would prevent candidates from amassing sufficient resources to campaign effectively); COLO. REV. STAT. ANN. § 1-45-104(2)(a) (1997) (\$500 per election); CONN. GEN. STAT. §§ 9-333m(a), 9-333q(a) (1997) (\$2500 per election limit on contributions to candidates for governor, \$1500 per election limit on contributions to other candidates for statewide office); DEL. CODE ANN. tit. 15, § 8010(a) (1993) (\$1200 per election); FLA. STAT. ANN. § 106.08 (1)(a) (West Supp. 1998) (\$500 per election); GA. CODE ANN. §§ 21-5-41, 21-5-43 (Supp. 1998) (limits of \$1000 per non-election year and \$5000 per election year); HAW. REV. STAT. § 11-204(a)(2) (Supp. 1997) (limit of \$6000 for primary and general elections combined); IDAHO CODE § 67-6610A(1) (Supp. 1998) (\$5000 per election); KAN. STAT. ANN. § 25-4153(a) (1993) (\$2000 per election); KY. REV. STAT. § 121.150(6) (Michie Supp. 1996) (\$1000 per election); LA. REV. STAT. ANN. § 18:1505.2(H)(1)(a) (West Supp. 1998)

(\$500 per election); ME. REV. STAT. ANN. tit. 21-A, § 1015(1) (West Supp. 1997) (\$1000 per election; beginning in 1999, \$500 per election limit for gubernatorial candidates and \$250 for other candidates); MD. CODE ANN., ELEC. ART. 33 § 26-9(d) (1997) (\$4000 per election cycle); MASS. GEN. L. ANN. ch. 55, § 7A(a)(1) (West Supp. 1998) (\$500 per calendar year); MICH. COMP. LAWS § 169.252(1)(a) (West Supp. 1998) (\$3400 per election cycle); MINN. STAT. ANN. § 10A.27, subdiv. 1, (a)-(c) (West 1997) (for governor: \$2000 per election year and \$500 per other year; for attorney general: \$1000 per election year and \$200 per other year; for other statewide candidates: \$500 per election year and \$100 per other year); MONT. CODE ANN. § 13-37-216(1)(a)(i)-(ii) (1997) (for governor: \$400 per election; for other statewide candidates: \$200 per election); NEV. REV. STAT. § 294A.100 (1998) (\$5000 per election cycle); N.H. REV. STAT. ANN. § 664:4V (1996) (\$5000 per election); N.J. STAT. ANN. §§ 19:44A-11.3(a) and (b) and 19:44A-29(a) (West Supp. 1998) (\$1500 per election for individuals; \$5000 per election for political committee contributions to non-gubernatorial candidates); N.Y. ELEC. LAW § 14.114(1)(a) (McKinney 1998) (for general election: the lower of \$25,000 or \$.025 multiplied by the number of registered voters; for primary election: \$.005 multiplied by the number of voters in the party, but no lower than \$4000 and no higher than \$12,000); N.C. Gen. Stat. § 163-278.13(a) (Supp. 1997) (\$4000 per election); OHIO REV. CODE ANN. § 3517.102(B)(1) and (2) (Baldwin Supp. 1998) (\$2500 per election); OKLA. STAT. ANN. tit. 74, ch. 62 app. § 257:10-1-2(a)(2) (West Supp. 1998) (\$5000 per campaign); OR. REV. STAT. § 260.160(1)(a) (Supp. 1998) (\$500 per election), *but see Vannata v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997) (limit found in violation of Oregon constitution); R.I. GEN. LAWS § 17-25-10.1(a)(1) (1996) (\$1000 per calendar year); S.C. CODE ANN. § 8-13-1314(A)(1)(a) (Law. Co-op. Supp. 1997)

(\$3500 per election cycle); S.D. CODIFIED LAWS § 12-25-1.1 (Michie Supp. 1995) (\$1000 per calendar year); TENN. CODE ANN. § 2-10-302(a)(1) (Supp. 1998) (\$2500 per election); VT. STAT. ANN. tit. 17, § 2805 (Supp. 1998) (effective November 4, 1998, \$400 per election cycle); WASH. REV. CODE ANN. § 42.17.640(1) (West Supp. 1998) (\$1000 per election); W. VA. CODE § 3-8-12(f) (Supp. 1998) (\$1000 per election); WIS. STAT. ANN. § 11.26(1)(a) (West Supp. 1997) (\$10,000 per election); WYO. STAT. § 22-25-102(c) (1997 and Supp. 1998) (\$1000 per election). Limits have also been adopted in the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. D.C. CODE ANN. § 1-1441.1(a) (Supp. 1998) (for primary and general elections combined, limits of \$2000 for mayor, \$1500 for council chair, \$1000 for at-large council member, \$500 for at-large board of education member); P.R. LAWS ANN. tit. 16, § 3105 (Supp. 1993-1994) *amended* by 1995 P.R. Laws 212 (\$1000 per non-election year; \$500 per primary election; \$2500 per election year for governor; \$1000 per election year for other offices); V.I. CODE ANN. tit. 18, § 905 (1998) (\$1000 per election). Many cities also have adopted contribution limits. *See, e.g.*, Revised Municipal Code, City and County of Denver, Colorado, § 15-37(a) (following contribution limits per election cycle: \$3000 for mayor, \$2000 for auditor, \$2000 for council member-at-large, \$1000 for district council member); Code of Ordinance, City of Minneapolis, Minnesota, 167.20 (following limits on contributions in two-year period by individuals: \$3000 for mayor, \$1500 for comptroller-treasurer, \$600 for other elected city offices); Municipal Code, City of San Jose, California §§ 12.06.320 and .330 (contribution limits per election of \$250 for mayor and \$100 for city council); Seattle Municipal Code 2.04.370 (\$400 per election cycle limit for mayor, city council, and city attorney); City Charter, City of Tucson, Arizona, Ch. XVI, subchp. A, § 2 (\$500 per campaign limit for mayor and city council).

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

Supreme Court U.S.

FILED

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JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*
v. *Petitioners,*

SHRINK MISSOURI GOVERNMENT PAC
and ZEV DAVID FREDMAN,
Respondents.

JOAN BRAY,
v. *Petitioner,*

SHRINK MISSOURI GOVERNMENT PAC,
a political action committee,
ZEV DAVID FREDMAN, and RICHARD ADAMS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

**BRIEF IN OPPOSITION OF RESPONDENTS
SHRINK MISSOURI GOVERNMENT PAC
AND ZEV DAVID FREDMAN**

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QUESTION PRESENTED

Did the court of appeals hold correctly that Missouri "failed to come forward with evidence" that campaign contributions in excess of \$275, \$525, or \$1,075 cause either corruption or the appearance of corruption?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

 No. 98-963

JEREMIAH W. (JAY) NIXON,
 Attorney General of Missouri, *et al.*,
 v. *Petitioners*,

SHRINK MISSOURI GOVERNMENT PAC
 and ZEV DAVID FREDMAN,
Respondents.

 No. 98-978

JOAN BRAY,
 v. *Petitioner*,
 SHRINK MISSOURI GOVERNMENT PAC,
 a political action committee,
 ZEV DAVID FREDMAN, and RICHARD ADAMS, *et al.*,
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 On Petition for Writ of Certiorari to the
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BRIEF IN OPPOSITION OF RESPONDENTS
 SHRINK MISSOURI GOVERNMENT PAC
 AND ZEV DAVID FREDMAN

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 161 F.3d 519 (8th Cir. 1998). The court of appeals' order entering an injunction pending appeal (Pet. App. 20a-23a) is reported at 151 F.3d 763 (8th Cir. 1998). The opinion of the district court (Pet. App. 24a-41a) is reported at 5 F. Supp. 2d 734 (E.D. Mo. 1998).

JURISDICTION

The court of appeals entered its judgment on November 30, 1998. A petition for writ of certiorari was filed on December 11, 1998 by Jeremiah W. Nixon, Attorney General of Missouri, *et al.*, and it was placed on the docket on December 14, 1998. A second petition for writ of certiorari was filed on December 15, 1998, by an intervenor on appeal, Joan Bray, and it was placed on the docket on December 16, 1998.¹ The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The court of appeals held that Missouri's \$275, \$525, and \$1,075 limits on campaign contributions violate the First Amendment. It rejected Missouri's contention "that it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." Pet. App. 5a. Instead, the court of appeals "required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* (citations omitted). Missouri, however, could not "prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." *Id.* at 6a. Indeed, "the State [was]

¹ The Attorney General's petition is designated Mo. Pet., and the intervenor's petition is designated Bray Pet. The two petitions share an appendix, which is attached to the Attorney General's petition.

unable to adduce sufficient evidence even to show that there is a genuine issue of material fact regarding its alleged interest." *Id.* at 7a.

1. Before 1994, Missouri did not limit either political contributions to candidates for state and local office or candidates' political expenditures. In 1994, Missouri imposed limits on candidates' campaign expenditures and on political contributions in two sets of amendments to Missouri's Campaign Finance Disclosure Law. Mo. Rev. Stat. §§ 130.011 *et seq.* (1994 & Supp. 1997). In July 1994, the Missouri legislature enacted Senate Bill 650, which imposed limits on campaign contributions and expenditures. On November 8, 1994, the Missouri electorate approved Proposition A, a ballot initiative that also established campaign finance regulations and expenditure limits. The Missouri Attorney General ruled that Proposition A, which was to become effective immediately, superseded Senate Bill 650 to the extent its provisions were more restrictive and that, otherwise, Senate Bill 650 would become effective on January 1, 1995. 94 Mo. Op. Att'y Gen. 218 (Dec. 6, 1994).

In 1995, the Court of Appeals for the Eighth Circuit held that certain campaign expenditure limits imposed by Senate Bill 650 and by Proposition A violated the First Amendment. *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The court of appeals also held that Proposition A's \$100, \$200, and \$300 limits on campaign contributions violated the First Amendment. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The *Carver* court held that Missouri had "no evidence as to why the Proposition A limits of \$100, \$200, and \$300 were selected." 72 F.3d at 642-43. The state had "no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions." *Id.* at 643.

After the invalidation of the contribution limits set by Proposition A, the limits imposed by Senate Bill 650 became effective. Mo. Rev. Stat. § 130.032 (Supp. 1997). Senate Bill 650 originally limited campaign contributions to candidates for office in Missouri on a sliding scale from \$250 to \$500 to \$1,000. *Id.* § 130.032.1. It also provided that these contribution limits "shall be increased" to take inflation into account, *id.* § 130.032.2, and, in January 1998, the Missouri Ethics Commission increased the contribution limits.

Missouri statutes now prohibit contributions of more than \$275 to candidates for state representative or for offices in districts with a population of under 100,000, *id.* § 130.032.1(3), (4); contributions of more than \$525 to candidates for state senate or for any office in electoral districts with a population between 100,000 and 250,000, *id.* § 130.032.1(2), (5); and contributions of more than \$1,075 to candidates for governor, lieutenant governor, secretary of state, state treasurer, state auditor and attorney general, as well as to candidates in districts with a population of at least 250,000. *Id.* § 130.032.1(1), (6). Contributors and candidates who violate these limits are subject to criminal penalties and to substantial civil sanctions. *Id.* §§ 130.032.7, 130.081 (1994 & Supp. 1997).

2. On May 12, 1998, the district court, on cross-motions for summary judgment, upheld Missouri's campaign contribution limits. Pet. App. 24a-41a. It found that "[t]he issue is purely legal: do Missouri's limits on campaign contributions violate the first amendment?" and that "regulation of first amendment rights" is subject to "strict scrutiny." *Id.* at 30a. The court did not decide whether Missouri "must demonstrate that campaign contributions in excess of the statutory limits cause some 'real harm,' i.e., that such contributions cause either corruption or the appearance of corruption." *Id.* Instead, the court held that "[i]f a showing of 'real harm' is required (the state claims it is not), . . . defendants here have made that showing." *Id.*

The district court relied on "evidence in the form of an affidavit from the state senator who co-chaired the Interim Joint Committee on Campaign Finance Reform at the time of Senate Bill 650's passage." *Id.* at 31a. This senator, Wayne Goode, stated that the committee "heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence" and "testified to his belief that contributions in excess of the limits set by Missouri 'have the appearance of buying votes as well as the real potential to buy votes.'" *Id.* (footnote omitted).

The district court also held that the Missouri contribution limits are "narrowly tailored", *id.* at 35a-37a, and that "the effect of inflation since *Buckley* [*Buckley v. Valeo*, 424 U.S. 1 (1976)] was decided has not created a 'difference in kind' between a \$1,000 contribution in 1976, and a \$1,075 contribution in 1998." *Id.* at 37a (footnote omitted).

3. On July 23, 1998,² the court of appeals entered an order enjoining enforcement of the campaign contribution limits pending the appeal. Pet. App. 20a-23a. The court of appeals based this order on *Russell v. Burris*, 146 F.3d 563 (8th Cir.), *cert. denied*, 119 S.Ct. 510 (1998), a then very recent June 4, 1998 decision. In *Russell*, the court of appeals had held that that Arkansas' \$100 and \$300 limits on campaign contributions violated the First Amendment because the state "did not prove that the perception of corruption . . . was objectively reasonable." 146 F.3d at 569.

In granting the injunction pending appeal, the court of appeals found that "[a]ll campaign contribution limits restrict political speech, and . . . implicate the First Amendment." Pet. App. 22a. It then held that "it seems likely

² The opinion of the court of appeals twice states that the injunction was entered on July 27, 1998. Pet. App. 3a, 4a. In fact, the court of appeals entered its order on July 23 and then amended the order by making a grammatical correction on July 27, 1998.

that the state has failed in its burden of proof to show 'that there is real or perceived undue influence or corruption attributable to large political contributions . . . and . . . that [the contribution limits] are narrowly tailored to address that reality or perception.'" *Id.* (quoting *Russell v. Burris*, 146 F.3d at 568). The court also held that "it is likely the state has failed to show 'that a reasonable person could perceive, on the basis of the evidence presented at trial, that such contributions make for undue influence or spawn corruption.'" *Id.* (quoting *Russell v. Burris*, 146 F.3d at 569). The court of appeals then noted that the Missouri campaign contribution limits "are, after adjustment for inflation, dramatically lower than the \$1,000 limit upheld in *Buckley* . . . and do not appear to be narrowly tailored to address any legitimate interest in avoiding corruption or the appearance of corruption." *Id.*

4. Missouri applied to this Court, on July 30, 1998, for an order staying the injunction pending appeal. Justice Thomas denied the application on July 31, 1998.

5. The court of appeals reversed the judgment of the district court and held that the Missouri campaign contribution limits violate the First Amendment. Pet. App. 9a, 9a-10a (Ross, J., concurring).

a. Chief Judge Bowman, joined by Judge Ross, held that the state had not carried its burden of justifying the \$275, \$525, and \$1,075 campaign contribution limits. *Id.* at 5a-7a; 9a-10a (Ross, J., concurring).

The court of appeals first rejected Missouri's attempt to "posit[], citing *Buckley*, that corruption and the perception thereof are inherent in political campaigns where large contributions are made" and "that it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." *Id.* at 5a. Instead, the court of appeals "required some demonstrable evidence that there were genuine problems that resulted from contributions

in amounts greater than the limits in place." *Id.* (citations omitted). In imposing this burden on Missouri "to prove its compelling interest," the court of appeals expressly invoked this Court's decisions in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). *Id.* at 6a n.3.

Missouri, however, could not "prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." *Id.* at 6a. The court of appeals refused to "extrapolate" from examples of corruption noted by the *Buckley* Court "that in Missouri at this time there is corruption or a perception of corruption from 'large' contributions, without some evidence that such problems really exist." *Id.* (citations omitted). The court refused to "infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago." *Id.*

The state's evidence—Senator Goode's affidavit—did not fill the evidentiary void. The court of appeals found that this senator "pointed to no evidence that 'large' campaign contributions were being made in the days before limits were in place, much less that they resulted in real corruption or the perception thereof." *Id.* at 7a (citation omitted). Although this senator stated "that he and his colleagues believed that there was the 'real potential to buy votes' if the limits were not enacted, and that contributions greater than the limits 'have the appearance of buying votes,'" he "did not state that corruption then existed in the system." *Id.* Moreover, there was no way for the court of appeals to determine "whether this single legislator's perception of corruption is the 'public perception', whether it is objectively 'reasonable,' and whether it 'derived from the magnitude of . . . contributions' that historically have been made to candidates running for

public office in Missouri.” *Id.* (quoting *Russell v. Burris*, 146 F.3d at 569).

In short, Missouri “failed to come forward with evidence to prove a compelling interest that would be served by the restrictions SB650 imposes on campaign contributions.” *Id.* Indeed, “the State [was] unable to adduce sufficient evidence even to show that there is a genuine issue of material fact regarding its alleged interest.” *Id.*

b. Chief Judge Bowman, writing separately,³ also determined that the \$275, \$525, and \$1,075 contribution limits are not “narrowly tailored” because they “are so small that they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms.” *Id.* at 7a, 8a. The Chief Judge found that “[a]fter inflation, limits of \$1,075, \$525, and \$275 cannot compare with the \$1,000 limit approved in *Buckley* twenty-two years ago.” *Id.* at 8a (footnote omitted). Noting the contention that “\$1,075 in 1976 dollars is the equivalent of just \$378 in purchasing power today,”⁴ *id.* at 8a n.4, Chief Judge Bowman found that “[i]n today’s dollars, the SB650 limits appear likely to ‘have a severe impact on political dialogue’ by preventing many candidates for public office ‘from amassing the resources necessary for effective advocacy.’” *Id.* at 8a (quoting *Buckley*, 424 U.S. at 21).

³ Judge Ross agreed with Chief Judge Bowman “that the State failed to satisfy its evidentiary burden.” Pet. App. at 9a-10a (Ross, J., concurring). On the basis of “the reasons stated by Judge Gibson [in dissent],” he did “not join in part III B of Judge Bowman’s opinion finding that the contribution limits are different in kind from those approved in *Buckley v. Valeo*, 424 U.S. 1 (1976).” *Id.* at 10a.

⁴ Chief Judge Bowman rejected Missouri’s contention that the Consumer Price Index (CPI) should not be used “to calculate the effects of inflation on dollars spent for campaign contributions” and noted that the state itself uses the CPI to account for the effects of inflation after the date (1994) when the contribution limits were enacted. Pet. App. 8a n.4 (citing Mo. Rev. Stat. § 130.032.2 (Supp. 1997)).

Thus, “absent the State’s having proven the actual necessity for such a heavy-handed restriction of protected speech,” the \$275, \$525, and \$1,075 contribution limits were “‘too low to allow meaningful participation in protected political speech and association, and thus [were] not narrowly tailored to serve’ the alleged interest.” *Id.* (citation omitted).

The Chief Judge specifically disclaimed any attempt to “‘fine tun[e]’ the work of the Missouri legislature” or to exercise “authority that is not ours.” *Id.* (citing *Buckley*, 424 U.S. at 30). He concluded that “the difference between these limits of \$1,075, \$525, and \$275, and larger dollar limits that might be constitutionally sound . . . are not ‘distinctions in degree’ but ‘differences in kind.’” *Id.* at 8a-9a (citations omitted). He “remind[ed] the State that it has the burden of showing that any limits it places on campaign contributions are narrowly tailored to serve the State’s compelling interest in addressing proven ‘real or perceived undue influence or corruption attributable to large political contributions.’” *Id.* at 9a (quoting *Russell v. Burris*, 146 F.3d at 568). Any “problem of judicial line-drawing can be expected largely to disappear” if “those who would regulate and limit constitutionally protected political speech satisfy their heavy burden of proof.” *Id.*

c. Judge Gibson, in dissent, would have upheld Missouri’s \$275, \$525, and \$1,075 contribution limits because he “[could] not distinguish *Buckley*.” *Id.* at 10a.

Judge Gibson found that there was no “difference in kind” between Missouri’s \$1,075 limit and the “\$1,000 [limit] upheld in *Buckley*,” and he would have upheld the lower \$275 and \$525 contribution limits because *Buckley* had noted Congress’ power to structure contribution limits with respect to graduated expenditure limits. *Id.* at 11a, 12a. He rejected Chief Judge Bowman’s “argument . . . that inflation has dissipated the similarity between the limits in this case and those approved in *Buckley*”;

in his view, “[i]nflation has not undermined *Buckley*’s precedential weight or modified its holding.” *Id.* at 13a.

Judge Gibson also concluded that “the State has adequately justified the contribution limits at issue.” *Id.* at 14a; *see id.* at 14a-18a. Missouri, “by the Goode affidavit, [had] demonstrated . . . the dangers posed by unlimited campaign contributions.” *Id.* at 17a. Judge Gibson could not “reconcile the short shrift given the Goode affidavit . . . with the Supreme Court’s approach in *Buckley*, which cited no actual evidence that large contributions might give rise to the appearance of political corruption and which deferred to what Congress could have reasonably concluded.” *Id.* (footnote and citations omitted).

REASONS FOR DENYING THE WRIT

Petitioners have not presented any question that warrants this Court’s review. This case turns on a straightforward application of the common-sense proposition, frequently stated by this Court, that conjectural harms do not justify restrictions on speech. As the court of appeals recognized (Pet. App. 6a n.3), this Court has held that

“[w]hen the Government defends a regulation of speech . . . , it must do more than simply ‘posit the existence of the disease sought to be cured.’ . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulations will in fact alleviate these harms in a direct and material way.”

United States v. National Treasury Employees Union, 513 U.S. at 475 (quoting *Turner Broadcasting System, Inc.*, 512 U.S. at 664 (plurality opinion of Kennedy, J.)).

Moreover, as this Court recently held, limits on independent expenditures by political parties violate the First Amendment absent evidence that these expenditures cause some real harm. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996). In *Colorado Republican*, six members of this Court invoked and ap-

plied the same standard as the Eighth Circuit: Justice Kennedy’s statement in *Turner Broadcasting System*, 512 U.S. at 664, of the government’s duty to demonstrate that regulations of speech address a real harm. 518 U.S. at 618 (Breyer, J., O’Connor, & Souter, JJ.) (citing *Turner Broadcasting System, Inc.*, 512 U.S. at 664 (Kennedy, J.) and noting that “[t]he Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures”), *id.* at 647 (Thomas, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part) (citing *Turner Broadcasting System, Inc.*, 512 U.S. at 664 (Kennedy, J.) and noting that “[t]he Government . . . has identified no more proof of the corrupting dangers of coordinated expenditures than it has of independent expenditures”).

Just as this Court imposed a duty on the national government to demonstrate that political party expenditures cause some harm, the court of appeals required Missouri to demonstrate “that there were genuine problems that resulted from contributions in amounts greater than the limits in place.” Pet. App. 5a. Missouri, however, did not “adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest.” *Id.* at 7a. Although Judge Gibson argued in dissent that a state senator’s affidavit was sufficient to justify the contribution limits, *see id.* at 14a-17a, disagreement about the weight to be given Missouri’s limited evidence does not warrant this Court’s attention.

Given the actual ground of the court of appeals’ judgment—insufficient evidence of harm to justify the \$275, \$525, and \$1,075 contribution limits—petitioners’ suggestions of inter-circuit conflict and conflict with this Court’s decision in *Buckley* are overstated, and petitioners’ assertion that the court of appeals imposed an “impossible burden” on Missouri is mistaken.

1. Any inter-circuit conflict over the validity of state laws prohibiting contributions in excess of \$1,000, is, at most, only skin deep. See Mo. Pet. 9-10; Bray Pet. 13. The Sixth Circuit has upheld a Kentucky \$1,000 contribution limit, *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir.), cert. denied, 118 S.Ct. 162 (1997), and the Eighth Circuit's judgment may appear at first blush (as Judge Gibson noted in dissent) to "create[] a conflict between the circuits." Pet. App. 18a.

With regard to the actual ground for the Eighth Circuit's judgment, however, there is no conflict with the Sixth Circuit.⁵ The Sixth Circuit simply did not have any

⁵ The state's claim that the "panel majority" (Mo. Pet. 8) acknowledged a conflict with the Sixth Circuit is mistaken. Chief Judge Bowman, writing separately (see note 3 *supra*), concluded that Missouri's \$275, \$525, and \$1,075 contribution limits were "different in kind" than the \$1,000 limit at issue in *Buckley*, and he conceded that his conclusion was not consistent with Sixth Circuit decision in *Kentucky Right To Life, Inc. v. Terry*. Pet. App. 9a (quoting the *Terry* court as "holding that \$1,000 limitation on direct contributions in connection with local and state elections in Kentucky is not different in kind from the \$1,000 limitation on direct contributions in connection with federal elections upheld in *Buckley*"). Chief Judge Bowman's separate opinion (Part III B (Pet. App. 7a-9a)), however, is not the opinion of the "panel majority." Judge Ross joined only Part III A (*id.* at 5a-7a) of Chief Judge Bowman's opinion, and they formed a "panel majority" on only one point and held, in Judge Ross' words, "that the State failed to satisfy its evidentiary burden." *Id.* at 10a. Similarly, Chief Judge Bowman's separate opinion does not provide any occasion to address Bray's contention that the lower courts are divided on "how to determine when contribution limits are 'different in kind' from the \$1,000 limits upheld in *Buckley*." Bray Pet. 21; see *id.* at 21-24.

Nonetheless, Missouri's \$275, \$525, and \$1,075 contribution limits are in fact "different in kind," not only when compared to the federal \$1,000 limit on individual contributions, but also when they are compared to the \$5,000 limit on contributions by political committees approved in *Buckley*. 424 U.S. at 35-37. The Missouri contribution limits apply both to individuals and political action committees, like respondent Shrink Missouri Government PAC. Thus,

occasion to consider whether a state, in the words of the Eighth Circuit, must have "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* at 5a (citations omitted). In the Sixth Circuit case, the Kentucky legislature had increased the contribution limit to \$1,000 from \$500 after plaintiffs filed their opening appellate brief, and counsel "essentially conceded at oral argument that the \$1,000 limitation on contributions is constitutional under *Buckley*." *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d at 641-42 & n.10, 642-43 & n.19, 648 n.24. Thus, the Sixth Circuit's cursory approval of Kentucky's \$1,000 limit is hardly surprising, and petitioners' assertion here—"it is clear that the limits embodied in Missouri's legislation would be upheld today by the Sixth Circuit"—is strained. Mo. Pet. 5.

2. Petitioners' other suggestion of inter-circuit conflict elevates form over substance. Missouri and Bray assert that the Eighth Circuit has created a conflict with the Ninth and Sixth Circuits in defining the level of scrutiny applicable to contribution limits. See Mo. Pet. 10-13; Bray Pet. 15-17. The judgments of the courts of appeals of these three circuits, however, do not raise the broad question that petitioners would have this Court pursue—whether campaign contribution limits should be subject to a lower level of scrutiny (intermediate) than campaign expenditure limits (strict scrutiny). Mo. Pet. 11; Bray Pet. 17.

a. The Eighth Circuit applied strict scrutiny to Missouri's \$275, \$525, and \$1,075 contribution limits and held that Missouri "must demonstrate . . . that it has a compelling interest and that the contribution limits at issue are narrowly drawn to serve that interest." Pet. App. 5a. The Ninth Circuit recently applied "rigorous, rather

contrary to the state's contention (Mo. Pet. 5 n.2), Missouri's \$275, \$525, and \$1,075 limits on contributions should also be compared to the federal \$5,000 limit as adjusted for inflation.

than strict, scrutiny" to Oregon's limit on out-of-state contributions and held that this Oregon measure "can survive rigorous scrutiny only if it is closely drawn to advance a sufficiently important interest." *Vannatta v. Kiesling*, 151 F.3d 1215, 1216, 1221 (9th Cir.), petition for cert. filed, 67 USLW 3348 (Nov. 9, 1998) (No. 98-775). Even assuming that in some circumstances there might be a difference between "strict" and "rigorous" scrutiny, these standards, as actually applied by the Eighth and Ninth Circuits, are the same.

Just as the Eighth Circuit "required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits" (Pet. App. 5a), the Ninth Circuit unanimously held that Oregon's prohibition of out-of-district contributions did not "pass muster under the First Amendment" because the state was "unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*." *Vannatta v. Kiesling*, 151 F.3d at 1221 (citations omitted); see *id.* at 1216, 1222 (this portion of concurring opinion adopted as unanimous opinion of the panel). Far from creating a conflict with the Eighth Circuit, the Ninth Circuit relied on a decision of the Eighth Circuit to support its requirement that Oregon must have some evidence that the prohibited political contributions cause corruption. *Id.* at 1221 (citing *Carver v. Nixon*, 72 F.3d at 644, for holding that "limits on the size of contributions were not closely drawn to reducing corruption as state made no showing that small contribution limits were necessary to curb corruption").

In short, there is no conflict between the Eighth and Ninth Circuits. The courts of appeals in both circuits, albeit under differently labeled standards of scrutiny, required Missouri and Oregon to demonstrate that the prohibited campaign contributions cause corruption or the appearance of corruption. The judgments of both the Eighth Circuit and the Ninth Circuit that state campaign

contribution limits violate the First Amendment rest on exactly the same ground: the states did not have any evidence that prohibited political contributions cause any harm.

b. Similarly, there is no conflict between the Eighth Circuit and the Sixth Circuit about the proper level of scrutiny of state limits on campaign contributions to candidates. Bray asserts, for example, that the Sixth Circuit "applied an unarticulated intermediate level of scrutiny to Kentucky's \$1,000 individual contribution limits." Bray Pet. 16. The Sixth Circuit, however, did not apply any level of scrutiny—strict or intermediate—to Kentucky's \$1,000 limit on individual contributions to candidates.⁶ *Kentucky Right To Life, Inc. v. Terry*, 108 F.3d at 648. Instead, the Sixth Circuit, as discussed above, upheld Kentucky's \$1,000 contribution limit, which the state legislature had increased from \$500 while the appeal was pending, on the basis of counsel's concession. 108 F.3d at 648 & n.24.

3. Petitioners' suggestions that the Eighth Circuit's judgment conflicts with *Buckley* are not well-taken. See Mo. Pet. 13-15; Bray Pet. 10-13.

a. Bray asserts that the Eighth Circuit's decision is a "flat rejection" of this Court's holding in *Buckley* "that combating the perception of corruption is a sufficient governmental interest for imposing contribution limits." Bray

⁶ Missouri asserts that the Sixth Circuit adopted "the proposition that a contribution limit 'does not receive the full First Amendment protection.'" Mo. Pet. 12 (quoting *Kentucky Right To Life, Inc. v. Terry*, 108 F.3d at 649). The Sixth Circuit, however, made this observation in the course of analyzing Kentucky's \$1,500 limit on aggregate contributions to permanent committees, which it carefully distinguished from the state's \$1,000 limit on direct contributions to candidates. *Kentucky Right To Life, Inc. v. Terry*, 108 F.3d at 648-49. Thus, there is no support for Missouri's conclusion that the Sixth Circuit and the Eighth Circuit apply different levels of scrutiny to limits on campaign contributions to candidates. See Mo. Pet. 12-13.

Pet. 10. Petitioner is mistaken. The court of appeals did not ignore this Court's determination in *Buckley* that avoiding the appearance of corruption, as well as avoiding corruption itself, are compelling governmental interests. In fact, the court of appeals expressly and repeatedly recognized that both of these interests may be compelling. *E.g.*, Pet. App. 6a ("State . . . must prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions"). Missouri, however, "failed to come forward with evidence" that contributions in excess of \$275, \$525, or \$1,075 caused either corruption or the appearance of corruption. *Id.* at 7a.

b. Petitioners also suggest that the court of appeals' requirement that Missouri must have "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits" (Pet. App. 5a) conflicts with this Court's decision in *Buckley*. Mo. Pet. 13-14; Bray Pet. 17-21. Even assuming, as Missouri asserts, that in *Buckley* the legislative record was "based on razor-thin evidence" and that this Court "was willing to accept largely on faith Congress's assessment of the existence of a compelling problem," the conflict, if any, is more apparent than real. Mo. Pet. 13.

As the court of appeals explained, but both petitions fail to note, "the State's burden to prove its compelling interest" is firmly grounded on this Court's subsequent decisions. Pet. App. 6a n.3 (quoting *United States v. National Treasury Employees Union*, 513 U.S. at 475, and *Turner Broadcasting System, Inc.*, 512 U.S. at 664 (plurality opinion of Kennedy, J.)). Thus, any threat to the \$1,000 federal contribution limit upheld in *Buckley* comes not from the Eighth Circuit but from this Court's decisions requiring the national government to demonstrate that restrictions on speech address some real harm. See *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. at 618, 647; *United States v. National Treasury Employees Union*, 513 U.S. at 475 (quoting *Turner*

Broadcasting System, Inc., 512 U.S. at 664 (plurality opinion of Kennedy, J.)).

4. Finally, petitioners' assertion that the Eighth Circuit imposed an "impossible burden" on the state is mistaken. Mo. Pet. 13; *see id.* at 13-15; Bray Pet. 19 ("impossibly stringent standard of proof"). Missouri, for example, invokes an aphorism—strict in theory, fatal in fact—and claims that "no state legislature could enact a contribution limit that can withstand judicial scrutiny in the Eighth Circuit." Mo. Pet. 12, 15. The court of appeals has not, however, imposed an "impossible burden" on Missouri. Strict scrutiny was fatal here because Missouri, on cross motions for summary judgment, was "unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest" in preventing corruption or the appearance of corruption. Pet. App. 7a.

Given this very limited holding, Bray's concern that the Eighth Circuit requires "elaborate, empirical proof" is misplaced.⁷ Bray Pet. 21; *see id.* at 20-21. Similarly, Missouri's concern that the Eighth Circuit's judgment threatens the campaign contribution limits of "[d]ozens of

⁷ Moreover, Missouri's claim that it has "tried to find evidence that would be sufficient to meet the court's standard" is, at the very least, premature. Mo. Pet. 14 n.6. The Missouri legislature enacted the contribution limits at issue in this case in 1994. The court of appeals then held in 1995 that another set of Missouri contribution limits adopted in a 1994 initiative violated the First Amendment because Missouri had "no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions." *Carver v. Nixon*, 72 F.3d at 643. Missouri, however, does not point to any effort that it subsequently made to respond to the Eighth Circuit's decision in *Carver* and "to find evidence that would be sufficient to meet the court's standard." In fact, when the legislature amended the campaign finance statutes in 1997, it set the contribution limits in exactly the same amounts originally enacted by the legislature in 1994. Compare Mo. Rev. Stat. § 130.032.1 (1994) with Mo. Rev. Stat. § 130.032.1 (Supp. 1997).

states and scores of local jurisdictions" is exaggerated. Mo. Pet. 16. These contribution limits are "subject to serious constitutional challenge under the Eighth Circuit's rationale" (Mo. Pet. 16) only if other states and localities, like Missouri, are "without some evidence" that there is a "real problem with corruption or a perception thereof as a direct result of large campaign contributions." Pet. App. 6a.

CONCLUSION

The petition for writ of certiorari should be denied.

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No. 98-963

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON, Attorney General of Missouri;
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SPIELBUSCH, members of the Missouri Ethics Commis-
sion; and ROBERT P. McCULLOCH, St. Louis County
Prosecuting Attorney;

Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC and
ZEV DAVID FREDMAN,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

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sion; and ROBERT P. McCULLOCH, St. Louis County
Prosecuting Attorney; *Petitioners,*

v.

SHRINK MISSOURI GOVERNMENT PAC and
ZEV DAVID FREDMAN,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

In the petition, Missouri demonstrated that the holding of the Eighth Circuit was hopelessly in conflict with: 1) a decision of the Sixth Circuit upholding a \$1000 contribution limit; 2) a holding of the Ninth Circuit rejecting strict scrutiny for challenges to campaign contributions, 3) this Court's fundamental holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), upholding a \$1000 campaign contribution limit for national campaigns; and 4) the standard

of judicial review applied by the Court in *California Medical Association v. FEC*, 453 U.S. 182 (1981). Instead of addressing these concerns, respondents attempt to short-circuit them by suggesting that this case really rests solely upon the quality and quantity of proof offered by the State in defense of its contribution limits. There are at least three flaws in this analysis that warrant submitting this brief reply.

First, it is impossible to determine the adequacy of the proof without first deciding what is the proper legal standard of proof. Respondents simply skate past that problem, but, by itself, that issue justifies certiorari in this case.

There can be no question that the panel majority concluded that strict scrutiny is the correct standard of judicial review just as prior Eighth Circuit panels had done in *Carver v. Nixon*, 72 F.3d 633, 638 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996), and *Russell v. Burris*, 146 F.3d 563, 568 (8th Cir.), *cert. denied*, 67 USLW 3177 (Nov. 16, 1998). The Eighth Circuit held that this was required by *Buckley*. Oddly, respondents simply ignore this Court's decision in *California Medical Association*, even though petitioners relied heavily upon that decision as clarifying that the proper standard of review for expenditure limits is different than the standard for contribution limits. To compound their error, respondents rely upon *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), as setting out the proper analysis, even though that case involves expenditures, which are plainly subject to a higher standard of judicial scrutiny. Indeed, the opinions cited by respondents reveal that the justices recognize that there is a fundamental difference between expenditure limits and contribution limits.

Second, the quality of proof here remains strikingly similar to the evidence relied upon by the Court in *Buckley*. Respondents do not challenge Missouri's char-

acterization of the evidence in *Buckley* as razor-thin; they instead argue that the question of how much proof is enough is not an issue worthy of this Court's review. Of course, that question is vital to every legislative body that has enacted or plans to enact contribution limits. If they must prove actual or perceived corruption in order to avoid having the limits declared unconstitutional, then this Court should make that clear. As matters stand, the quantum of proof throughout the nation is the minimal amount identified in *Buckley*, except in the Eighth Circuit. Thus, respondents' argument about evidence merely begs the question that warrants review; it does not answer it.

Finally, respondents do no more than wish away the problem posed by the requirement of narrowly tailoring. Thus, even if a legislature could demonstrate more convincingly than Missouri has that a significant interest is implicated by some contribution limit, it remains the case that no state can justify a particular limit under the Eighth Circuit's least restrictive means test.

In sum, this case does not turn on any question of evidence. To the contrary, the holding below poses clear legal issues that warrant this Court's attention under the traditional standards applied in granting certiorari—conflicts among the circuits and conflicts with prior decisions of this Court. What respondents ultimately ignore is the overwhelming importance of having the constitutional question raised by the Eighth Circuit resolved before the next election cycle. Even without the profound decisional conflicts, review would be warranted because of the seriousness of the question and the potential disruption of future elections.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1998

JEREMIAH W. NIXON, et al.,

v. *Petitioners,*

SHRINK MISSOURI GOVERNMENT PAC and
ZEV DAVID FREDMAN,

Respondents.

JOAN BRAY,

v. *Petitioner,*

SHRINK MISSOURI GOVERNMENT PAC, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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INTEREST OF AMICI

Amici include the following Secretaries of State: Dan Gwadesky of Maine, Mike Cooney of Montana, James Langevin of Rhode Island, Riley Darnell of Tennessee, Ken Hechler of West Virginia, and Doug LaFollette of Wisconsin.¹ *Amici* also include Steven G. Churchwell, General Counsel to the California Fair Political Practices Commission, Robert Watada, Executive Director of the Hawaii Campaign Finance Spending Commission, and George Russell, Director of the Kentucky Registry of Election Finance. In these positions, *amici* serve as chief election officers or supervisors of campaign finance in their States. They thus have considerable experience with the issues raised in this case, and in particular have witnessed the serious threats that unlimited campaign contributions pose to the integrity of the electoral process.

Amici seek review of the Eighth Circuit's decision in this case because that court's interpretation of *Buckley v. Valeo*, 424 U.S. 1 (1976), threatens to undermine reasonable campaign contribution limits at the state, local and federal level that are necessary to preserve the health of our democracy. Relying on this Court's conclusion that legislatures may eliminate "the opportunity for abuse inherent in the process of raising large monetary contributions" (*Buckley*, 424 U.S. at 30), thirty-five states and a

¹ The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

large number of localities have enacted campaign contribution limits similar to those at issue here, based on their studied belief that such regulations are necessary to prevent actual and apparent corruption in state and local government. These reasonable contribution limits help stem widespread public cynicism about elected officials' ability to govern in the public interest and check the capacity of wealthy interests to exert improper influence over legislative and executive policies. Left undisturbed, the Eighth Circuit's decision will erect a new, insuperable barrier for states to justify the adoption of such limits, undermining existing laws throughout the country and chilling the future efforts of other jurisdictions to enact similar, necessary regulations.

STATEMENT

In determining the proper balance between the need for funds adequate to run viable campaigns and the potential for buying influence, the Joint Interim Committee on Campaign Finance Reform of the Missouri General Assembly entertained testimony reflecting "a broad spectrum of opinions" before arriving, by consensus, at a schedule of carefully graduated contribution limits that would be adjusted over time according to inflation. (Appendix ("App.") 14a-15a).² Notably, the highest of

² In this brief, citations to "App." refer to the Appendix attached to the Petition for Writ of Certiorari filed by petitioners Jeremiah W. (Jay) Nixon, Richard Adams, Patricia Flood, Robert Gardner, Donald Gann, Michael Greenwell, Elaine Spielbusch, and Robert McCulloch. See *Nixon v. Shrink Missouri Government PAC*, Petition for Writ of Certiorari (filed December 14, 1998).

these contribution limits, which apply to statewide offices and to local offices where the population exceeds 250,000, match the limits applicable to candidates for federal office upheld in *Buckley* which are still in force today. In crafting appropriate contribution limits, the Missouri General Assembly conducted hearings and internal discussion regarding the actual condition of the state electoral system. App. 15a, 31a. After detailed deliberation, Missouri adopted limits that would address the danger of *quid pro quo* corruption and, equally importantly, combat the appearance of such corruption.

The District Court, noting that "[t]here is more than ample reason to defer to the considered judgment of the Missouri legislature", found the limits entirely consistent with this Court's decision in *Buckley*. App. 41a. A divided panel of the Eighth Circuit, however, reversed, announcing three distinct interpretations of what a state must demonstrate to justify the imposition of contribution limits and casting a pall of doubt over the future viability of such limits throughout the country. In so doing, the Eighth Circuit created a stark split with the Sixth Circuit, which recently upheld a \$1,000 contribution limit for similar campaigns. See *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir.), *cert. denied*, 118 S. Ct. 162 (1997). By rejecting out of hand the Missouri legislature's informed judgment regarding the actual conditions of Missouri politics, the panel majority ignored a central tenet of this Court's decision in *Buckley* and usurped a role specifically reserved by that case to the legislative branch of government.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS WHICH RECOGNIZE THAT LARGE CAMPAIGN CONTRIBUTIONS CAUSE REAL AND IRREPARABLE HARM TO OUR POLITICAL PROCESSES.

The panel majority below has effectively nullified an integral premise of this Court's campaign finance decisions by interpolating a new and impossible burden of proof for states to carry in order to justify contribution limits. See App. 19a (Gibson, J., dissenting). While the *Buckley* Court recognized that the contribution limits are necessary to serve the government's compelling interest in "deal[ing] with the reality or appearance of corruption inherent in a system" of large contributions (424 U.S. at 28) (emphasis added), the Court of Appeals insisted that the government does not have such a compelling interest absent proof of actual corruption. Compare *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) (plurality opinion) (contribution limits serve the government's compelling interest in "assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption"); *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973) (avoiding appearance of improper influence is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent").

The Eighth Circuit's decision flies in the face of this Court's common sense recognition that "the scope of [actual corruption] can never be reliably ascertained". 424

U.S. at 27. By requiring "demonstrable evidence" of "genuine problems" (App. 5a), the panel majority destroyed a major pillar of this Court's analysis of campaign finance, under which "marginal restrictions upon the contributor's ability to engage in free communication" have been approved in light of the grave, self-evident threat to our electoral systems' legitimacy posed by unlimited campaign contributions. See *Buckley*, 424 U.S. at 20-21. See also *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 500 (1985) (approving "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"); *FEC v. National Right to Work Committee*, 459 U.S. 197, 210 (1982) ("Nor will [the courts] second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) ("no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth is great, and the legislative purpose prophylactic").

Two decades after this Court first acknowledged the pervasive dangers "inherent in a regime of large financial contributions", the harms caused by unrestricted campaign contributions remain well beyond cavil. Anxiety about the corrosive influence of money in politics dominates public discourse throughout the country.³ Historical

³ See, e.g., E.J. Dionne, *Democracy or Plutocracy?*, THE WASHINGTON POST, op-ed, February 15, 1994, p.A17; Tom Fiedler, *Big Interests Spending Equally Big Bucks: Millions of Dollars Given to Campaigns of Influential Policy Makers*, THE MIAMI HERALD, May 21, 1995, p.14A; Philip B. Heyman & Donald J. Simon, *Parties to Corruption*, THE WASHINGTON POST, op-ed, June 25, 1998, p.A23;

examples of influence peddling and special interest legislation are legion. See generally, Charles Lewis and The Center for Public Integrity, *The Buying of Congress: How Special Interests Have Stolen Your Right to Life, Liberty, and the Pursuit of Happiness* (1998).

Public opinion polls at the national level confirm that citizens on all sides of the political spectrum perceive both actual and potential corruption in government. Notably, in a 1996 poll taken directly after the November elections, Americans ranked the "power of special interest groups in politics" second only to "international terrorists" when asked to identify "major threats" to the future of the country.⁴ A 1997 poll determined that three-quarters of Americans believe that "public officials make or change policy decisions as a result of money they

Albert R. Hunt, *The Best Congress Money Can Buy*, THE WALL STREET JOURNAL, September 7, 1995, p.A15; Celinda Lake & Steve Cobble, *Voters Say Take 'Big Money' Out of Campaigns*, MILWAUKEE JOURNAL SENTINEL, op-ed, April 16, 1995, p.4A; Rodney A. Smith, *White House Auction*, THE WASHINGTON POST, op-ed, April 14, 1995, p.A19; Howard Wilkinson, *No Campaign Money? Keep Your Mouth Shut About It*, THE CINCINNATI ENQUIRER, editorial, November 22, 1998, p.C1; *Political Scandal*, BOSTON GLOBE, editorial, October 31, 1996, p.A26; *Time to Rethink Buckley v. Valeo*, NEW YORK TIMES, editorial, November 12, 1998, p.A22; *Unlimited Cash, Undue Influence*, ST. LOUIS POST-DISPATCH, editorial, July 27, 1998, p.B6.

⁴ Princeton Survey Research Associates/Pew Research Center, *Public Opinion Survey* (November 1996) (available at <http://www.people-press.org/unionrpt.htm>). In this same survey, forty-nine percent of those polled believed the country was "losing ground" in its efforts to fight political corruption.

receive from major contributors."⁵ Further, although polls formerly showed that voters trusted their own congressional representatives while decrying corruption in general, even that has changed. An August 1998 poll of voters in eight states showed that between 65% and 75% of voters now believe that campaign contributions affect the votes of *their own* senators on issues of concern to special interests.⁶ Over the past two decades, experience has confirmed one of the basic premises of this Court's campaign finance cases: large campaign contributions pose a grave threat to the actual integrity of our government and erode citizens' faith in the honesty of our elected representatives.⁷

⁵ See Francis X. Clines, *Most Doubt a Resolve to Change Campaign Finance Reform, Poll Finds*, NEW YORK TIMES, Apr. 9, 1997, at A1.

⁶ The Mellman Group, Inc./Public Campaign, *Public Opinion Poll* (August 1998) (available at http://www.publiccampaign.org/poll9__3__98.html).

⁷ Even under the existing regimes of contribution limits, monied interests can still exert overwhelming influence over the electoral process through practices such as bundling – the coordinated donation of campaign contributions from individuals representing the same corporation, industry or special interest – and other stratagems. See, e.g., Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1140-1142 (1994); Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 326-327 (1993) (citing Larry Makinson, Center for Responsive Politics, *Open Secrets: The Encyclopedia of Congressional Money & Politics* (2d ed. 1992)). While contribution limits alone may not be sufficient to assure the integrity of our political processes, they nonetheless remain a necessary element of any regulatory scheme. Cf. *Buckley*, 424 U.S. at 28; *Colorado Republican*, 518 U.S. at 609.

In 1994, the people of Missouri found the threat to the integrity of the state's election process so severe that they overwhelmingly adopted contribution limits far below those passed by the state's General Assembly. Despite this, and despite the debates, hearings, and deliberations conducted by the Missouri legislature, the panel majority below deemed the state's showing of the public perception of corruption insufficient to prove large campaign contributions to be a "real problem". The Eighth Circuit's subversion of controlling precedent and common sense, which threatens to erode further the integrity of our electoral processes, warrants review by this Court.

II. THE EIGHTH CIRCUIT'S COMPLETE LACK OF DEFERENCE TO THE MISSOURI LEGISLATURE IS INCONSISTENT WITH THIS COURT'S CAMPAIGN FINANCE PRECEDENTS AND CASES INVOLVING FEDERAL CONSTITUTIONAL SUPERVISION OF STATE ELECTORAL SYSTEMS.

The panel's application of its new evidentiary standard to the instant case reveals that the burden is impossibly subjective and practically insuperable. The fact that a panel of distinguished jurists can so radically disagree about the adequacy of the state's showing demonstrates that the Eighth Circuit's new standard of review invites members of the judiciary to replace the studied judgment of the people's elected representatives with their own predilections. How many expressions of public dismay will suffice to establish a "real problem" (App. 6a) arising from the public's "imagined coercive influence of large financial contributions", which the *Buckley* Court deemed as threatening to our government's legitimacy as *quid pro*

quo corruption? 424 U.S. at 25-27. How specific and concentrated must the public perception of corruption be to justify a limit of \$1,000 instead of \$1,200, or \$1,201? Where the *Buckley* Court decided the former question as a matter of law, and deemed the latter a task for legislators, the Eighth Circuit has instead unilaterally 'overruled' this Court's common sense judgment and unjustifiably broadened the scope of its judicial review.

As the Petitioners have forcefully argued, the Court of Appeals' decision below will invite a wave of strategic litigation challenging contribution limits throughout the country. See *Nixon v. Shrink Missouri Government PAC*, Petition for Writ of Certiorari, at 16-17 (filed December 14, 1998). Since the proper scope and standard of review is now up in the air, numerous jurisdictions may be required to prove not only that they suffer "a real problem with corruption or a perception thereof as a direct result of large campaign contributions" App. 6a, but also that the specific dollar limits they adopted are narrowly tailored to actually combat corruption and the appearance of corruption while allowing "meaningful participation in protected political speech and association". App. 8a (citing *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995)). If the Eighth Circuit's categorical rejection of the Missouri legislature's studied decision regarding the appropriate level of contribution limits becomes the model for future cases, few if any state limits will withstand such judicial scrutiny.

Under the panel majority's decision, the state legislature is no longer competent to analyze the actual state of affairs in Missouri, despite the fact that its members have actual experience in campaign fundraising and have

studied this issue in depth. Remarkably, the panel majority dismissed the testimony of the person most familiar with the practices and deliberations of the Missouri legislature as "self-serving, given the senator's vested interest in having the courts sustain the law that emerged from his committee". App. 7a.⁸ This utter lack of deference on matters clearly within legislative competence is inconsistent with this Court's directives in *Buckley* and in other First Amendment cases. As the District Court below recognized, "a court has no scalpel to probe whether, say, a \$2,000 ceiling might not serve as well as \$1,000." App. 36a (quoting *Buckley*, 424 U.S. at 30). See also *Kentucky Right to Life*, 108 F.3d at 648. If, as a majority of the panel agreed, Missouri's contribution limits are not different "in kind" from those approved in *Buckley* (424 U.S. at 30), the court had no proper basis to substitute its own judgment as to their appropriate level.

Ignoring *Buckley* and two decades of intervening experience, the panel majority rejected as "conclusory" the Missouri legislatures' predictive judgment that, without limits, state government would fall prey to "real

⁸ Under this standard, no court adjudicating the constitutionality of contribution limits should ever entertain a legislator's "description of evidence before the [relevant] Committee, the conclusions drawn by the Committee, [or] . . . fellow legislators' first-hand knowledge of what it costs to wage a campaign and the dangers presented by contributions above the limits enacted". See App. 15a, n.6 (Gibson, J., dissenting). Without such testimony, states will have no authoritative way to satisfy the narrow tailoring prong of the Eighth Circuit's test, and judicial scrutiny of even the most reasonable contribution limits will prove fatal every time.

potential to buy votes" as well as the "appearance of buying votes". App. 7a. However, "[s]ound policy making often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665 (1994). See also *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively"). Similarly, the Eighth Circuit's insistence that Missouri prove the existence of a "real problem" with corruption specifically within its borders⁹ does not comport with this Court's First Amendment precedent:

"Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . or even, in a case applying strict scrutiny, to justify regulations based solely on history, consensus, and 'simple common sense,' *Burson v. Freeman*, 504 U.S. 191 (1992)."

Florida Bar Assoc. v. Went For It, Inc., 515 U.S. 618, 628 (1995). Contrary to these principles, the panel majority announced a new and stringent standard of proof, rejecting the conclusions the Missouri General Assembly (as described by a Campaign Finance Reform Committee

⁹ Contrasting the *Buckley* Court's allusion to "perfidy that had been uncovered in federal campaign financing in 1972", the panel majority refused to infer "that in Missouri at this time there is corruption or a perception of corruption". App. 6a (emphasis added).

chair with over thirty years' experience) because they a) did not necessarily reflect the "public perception"; b) were not "objectively 'reasonable' "; and c) were not "'derived from the magnitude of . . . contributions' that historically have been made to candidates . . . in Missouri". App. 7a (citing *Russell v. Burris*, 146 F.3d 563 (8th Cir.), cert. denied, 67 U.S.L.W. 3332 (U.S. Nov. 16, 1998)). Since Missouri, like many states, does not collect and preserve legislative history, one wonders how it could have possibly carried the burden announced by the panel majority.¹⁰ Having determined that Missouri's contribution limits were not different in kind, the Court of Appeals should have recognized the legislature's unique competence to assess the scope of present and future harms posed by large contributions and to adopt limits at appropriate levels.

In First Amendment cases, this Court has recognized the need for some level of deference to the factual determinations of legislators, particularly when future harms must be avoided, complex economic predictions must be made, and disparate interests must be balanced. See, e.g., *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997) (courts' "sole obligation" is to assure that legislature has drawn "reasonable inferences based on substantial evidence"); see also *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

¹⁰ "Judicial deference . . . is based not on the state of the legislative record . . . but 'on due regard for the decision of the body constitutionally appointed to decide' ". *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 646 (1997) (citing *Oregon v. Mitchell*, 400 U.S. 112, 207 (Harlan, J., concurring in part)).

The panel majority's lack of deference is also inconsistent with this Court's precedents in cases concerning the proper scope of federal review for state electoral regulations. These cases are instructive insofar as they announce the basic standard of deference that must be accorded legislatures managing the details of state electoral systems. In the context of state legislative redistricting, the Supreme Court has declined to require states to ensure absolute mathematical equality, but instead has deferred to state legislatures so long as they legislate in good faith within the broad dictates of the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 577 (1964); *White v. Register*, 412 U.S. 755, 764 (1973) (9.9% population deviation not a prima facie Equal Protection violation); *Brown v. Thomson*, 462 U.S. 846, 843 (1983) (substantial deference is to be accorded the political decisions of the people of a state acting through their elected representatives, particularly when there is no taint of arbitrariness or discrimination). The Court's deference in this area is notable given the fact that the injury in question, vote dilution, is arguably much more severe and electorally significant than the "marginal restrictions upon the contributor's ability to engage in free communication" occasioned by reasonable contribution limits. 424 U.S. 20-21.

The range of permissible deviation in redistricting cases affords a parallel to the 'difference in kind' doctrine announced in *Buckley*. In both instances, the federal courts have announced the standards of federal law and have allowed state legislatures some flexibility in adopting specific remedial legislation that conforms to local circumstances. Unless the Missouri General Assembly

adopted contribution limits different in kind from those approved in *Buckley*, the Court below had no cause to probe those limits for a violation of constitutional principles.

Sixteen states have adopted contribution limits for statewide offices at or below the level approved in *Buckley*. An additional nineteen states have set limits on roughly the same order of magnitude. App. 42a-44a. The Eighth Circuit decision subjects all of these laws, which are integral to the fair operation of our electoral system, to the likelihood of constitutional challenge. While the federal judiciary must outline the standards of federal law, the determination of the predicate facts that trigger the operation of those standards should be left in significant measure to the sound judgment of state legislatures, which are versed in local experience and charged with the duty of operating honest government. The panel's decision has rendered this duty infinitely more difficult. *Amici* respectfully urge this Court to review the Eighth Circuit's decision.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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January 1999

APR 12 1999

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
v. *Petitioners,*

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN and JOAN BRAY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

JOINT APPENDIX

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They were reproduced in the Appendix to the Petition for Writ of Certiorari on the pages indicated below:

A. Opinion of the Court of Appeals	1a
B. Order of the Court of Appeals Issuing Injunction Pending Appeal	20a
C. Opinion of the District Court	24a

*United States District Court
Eastern District of Missouri*

DOCKET ENTRIES

March 2, 1998—Plaintiffs file complaint.

March 2, 1998—Plaintiffs moved for temporary restraining order and for preliminary injunction.

March 4, 1998—District court holds hearing on motion for temporary restraining order.

March 9, 1998—District Court denies motion for temporary restraining order.

March 27, 1998—Defendant Robert P. McCulloch moves to dismiss as an improper party pursuant to Fed. R. Civ. P. 21, or in the alternative to join as necessary and indispensable parties all prosecutors in the state of Missouri.

April 3, 1998—Defendants Richard Adams, Patricia Flood, Robert Gardner, Ervin Harder, John Howald, Elaine Spielbusch, and Jeremiah W. Nixon ("state defendants"; petitioners here) move for summary judgment.

April 3, 1998—State defendants file opposition to plaintiffs' motion for preliminary injunction.

April 3, 1998—State defendants file answer.

April 13, 1998—Plaintiffs file motion for summary judgment.

May 1, 1998—Joan Bray moves to intervene as a defendant.

May 12, 1998—District court grants state defendants' motion for summary judgment and enters judgment for defendants. District court also denies plaintiffs' motion for summary judgment and plaintiffs' motion for preliminary

injunction; denies as moot defendant McCulloch's motion to join as necessary and indispensable parties all prosecutors in the state of Missouri, his motion to dismiss McCulloch as an improper party, and Joan Bray's motion to intervene.

May 14, 1998—Plaintiffs file notice of appeal to the U.S. Court of Appeals for the Eighth Circuit of the May 12 judgment.

May 22, 1998—Joan Bray moves the district court for reconsideration of denial of motion to intervene.

June 5, 1998—Plaintiffs move district court for injunction pending appeal.

July 1, 1998—District court denies motion for injunction pending appeal. District court also grants Joan Bray's motion to reconsider and grants her motion to intervene as a defendant.

January 22, 1999—District court, on remand, enters summary judgment for plaintiffs and enters permanent injunction.

*United States Court of Appeals
for the Eighth Circuit*

DOCKET ENTRIES

May 21, 1998—Appeal docketed.

July 1, 1998—Plaintiffs move in the court of appeals for an injunction pending appeal.

July 10, 1998—Joan Bray moves for leave to intervene on behalf of appellees.

July 23, 1998—Court of appeals enters injunction pending appeal.

July 24, 1998—State defendants move for rehearing and suggest rehearing *en banc* of the injunction pending appeal.

July 30, 1998—State defendants apply to the circuit justice for a stay pending appeal.

July 31, 1998—Circuit justice denies application for stay pending appeal.

August 3, 1998—Joan Bray's motion for leave to intervene is granted by court of appeals.

August 10, 1998—State defendants move for hearing *en banc*.

August 20, 1998—Court of appeals denies state defendants' motion for rehearing, suggestion for rehearing *en banc*, and suggestion for initial *en banc* hearing.

August 21, 1998—Court of appeals hears argument.

November 30, 1998—Court of appeals issues opinion and judgment.

December 18, 1998—Notice from Supreme Court that state defendants filed a petition for writ of certiorari on December 11, 1998.

January 20, 1999—Court of appeals issues its mandate.

January 26, 1999—State defendants move in the court of appeals for recall of mandate and stay pending appeal.

January 28, 1999—Notice from Supreme Court that on January 25, 1999 it granted petition for writ of certiorari filed by state defendants.

February 9, 1999—Court of appeals denies state defendants' motion for recall of mandate and stay pending appeal.

February 12, 1999—State defendants move in the court of appeals for rehearing with suggestion for rehearing *en banc* of court's denial of motion for recall of mandate and stay pending appeal.

March 25, 1999—Court of appeals denies state defendants' motion for rehearing with suggestion for rehearing *en banc* of court's denial of motion for recall of mandate and stay pending appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:98CV00357CEJ

SHRINK MISSOURI GOVERNMENT PAC,
a political action committee,
and ZEV DAVID FREDMAN,
Plaintiffs,

vs.

RICHARD ADAMS, in his official capacity as a Member of the MISSOURI ETHICS COMMISSION, PATRICIA FLOOD, in her official capacity as a Member of the MISSOURI ETHICS COMMISSION, ROBERT GARDNER, in his official capacity as a Member of the MISSOURI ETHICS COMMISSION, ERVIN HARDER, in his official capacity as a Member of the MISSOURI ETHICS COMMISSION, JOHN HOWALD, in his official capacity as Chairman of the MISSOURI ETHICS COMMISSION, ELAINE SPIELBUSCH, in her official capacity as a Member of the MISSOURI ETHICS COMMISSION, JEREMIAH W. NIXON, in his official capacity as MISSOURI ATTORNEY GENERAL, and ROBERT P. McCULLOUGH, in his official capacity as St. Louis County Prosecuting Attorney,
Defendants.

COMPLAINT

Come now Plaintiffs, SHRINK MISSOURI GOVERNMENT PAC ("PAC") and ZEV DAVID FREDMAN ("FREDMAN") and for their cause of action herein against Defendants RICHARD ADAMS ("ADAMS"), PATRICIA FLOOD ("FLOOD"), ROBERT GARD-

NER ("GARDNER"), ERVIN HARDER ("HARDER"), JOHN HOWALD ("HOWALD"), ELAINE SPIELBUSCH ("SPIELBUSCH"), JEREMIAH W. NIXON ("NIXON"), and ROBERT P. McCULLOUGH ("McCULLOUGH") state:

Parties

1. Plaintiff FREDMAN is a resident and registered voter of the State of Missouri.

2. Plaintiff PAC is a political action committee, duly organized and existing under the laws of the State of Missouri, with its principal place of business within the metropolitan St. Louis, Missouri area.

3. Defendants ADAMS, FLOOD, GARDNER, HARDER, and SPIELBUSCH are members of the Missouri Ethics Commission ("Commission"), as established pursuant to the Mo. Stat. Ann. § 105.955 *et seq.* (1997 & Supp. 1998). Defendant HOWALD is Chairman of the Commission. The Chairman and the members of the Commission are sued in their official capacities.

4. Defendant NIXON is the Attorney General of the State of Missouri and is sued in his official capacity.

5. Defendant McCULLOUGH is the Prosecuting Attorney of St. Louis County and enforces Missouri criminal statutes, including Mo. Stat. Ann. § 130.081 (West 1997), and he is sued in his official capacity.

6. Defendant FLOOD is a resident of St. Louis County, Missouri. Defendant HOWALD is a resident of Jefferson County, and defendants ADAMS, GARDNER, HARDER, SPIELBUSCH, NIXON and McCULLOUGH reside in Missouri.

Jurisdiction and Venue

7. This court has jurisdiction over this action under 28 U.S.C. § 1331 and under 28 U.S.C. § 1343(a)(3) and (4). Plaintiffs bring this action under 42 U.S.C. § 1983, and they also seek relief under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 1988. Venue is properly within this judicial district and division pursuant to 28 U.S.C. § 1391(b)(1) and E.D. Mo. L.R. 2.07 because Defendants Flood and Howald are residents of this judicial district and division and because the other defendants all reside in Missouri.

Factual Statements

8. The State of Missouri in 1994 adopted two sets of amendments to the Missouri Campaign Finance Disclosure Law (Mo. Ann. Stat. §§ 130.011 *et seq.* (West 1997 & Supp. 1998)). On July 7, 1994, the legislature enacted a comprehensive statute, commonly known as Senate Bill 650, establishing restrictions on campaign contributions and expenditures and effective January 1, 1995. On November 8, 1994, the electorate approved an initiative, popularly known as Proposition A, imposing campaign finance limits and effective upon its passage.

9. On December 19, 1995, the United States Court of Appeals for the Eighth Circuit held that certain campaign spending limits established by Senate Bill 650 and by Proposition A violated the First Amendment. *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996).

10. On December 19, 1995, the United States Court of Appeals for the Eighth Circuit held that Proposition A's \$100, \$200, and \$300 limits on campaign contributions violated the First Amendment. *Carver v. Nixon*,

72 F.3d 633 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996).

11. After the invalidation of the contribution limits set by Proposition A, the limits imposed by Senate Bill 650, as amended by the legislature in 1997, became effective. *See* Mo. Stat. Ann. § 130.032 (West Supp. 1998). Senate Bill 650 originally limited campaign contributions to candidates for office in Missouri on a sliding scale ranging from \$1000 to \$500 to \$250. *Id.* § 130.032.1. It also provides that these contribution limits "shall be increased" to take inflation into account. *Id.* § 130.032.2. On February 5, 1998, the Missouri Ethics Commission increased the contribution limits. Missouri Ethics Commission, Press Release (Feb. 5, 1998). The Missouri statute now prohibits contributions of more than \$1,075 for candidates for governor, lieutenant governor, secretary of state, state treasurer, state auditor, and attorney general, as well as for candidates in districts with a population of at least 250,000. Mo. Stat. Ann. § 130.032.1(1), (6) (West Supp. 1998). It prohibits contributions of more than \$525 for candidates for state senate and for candidates for any office in electoral districts with a population between 100,000 and 250,000. *Id.* § 130.032.1(2), (5) (West Supp. 1998). It prohibits contributions of more than \$275 for candidates for state representative or for offices in districts with a population of under 100,000. *Id.* § 130.032.1(3), (4) (West Supp. 1998).

12. These contribution limits apply both to contributors and to candidates and their committees. Mo. Stat. Ann. §§ 130.032.1, 130.032.3 (West Supp. 1998). Contributors and candidates who violate these contribution limits are subject to criminal sanctions. Mo. Stat. Ann. § 130.081 (West 1997). Committees, candidates, and both the treasurer and deputy treasurer of candidate com-

mittees are subject to substantial civil sanctions for violations of these contribution limits.

13. In the 1994 elections, Plaintiff PAC contributed \$1800 to candidates for Missouri elective office; it contributed \$250 in 1996; and it contributed \$2025 in 1997.

14. In support of Plaintiffs' Fredman's campaign for election to the office of state auditor, Plaintiff PAC contributed \$1025 to "Fredman for Auditor" on June 23, 1997, and it contributed an additional \$50 on February 25, 1998. Plaintiff PAC made these contributions to advance Fredman's political career, political opinions, and political policies and to advance the political viewpoints of its contributors. Plaintiff PAC would contribute more money to "Fredman for Auditor" in the 1998 primary election but for the sanctions imposed by Missouri law for making contributions in excess of \$1075 to candidates in the primary elections for state auditor. Plaintiff PAC would also make contributions to other candidates in excess of \$525 and \$275 limits but for the contribution limits imposed by the Missouri statutes.

15. Plaintiff Fredman, who has been a certified public accountant, is a candidate for the office of state auditor. Before March 31, 1998 as required by state law, he will file to run in the Republican primary on August 5, 1998 and pay the \$200 filing fee.

16. Plaintiff Fredman formed a candidate committee, "Fredman for Auditor," on June 17, 1997, and Russell Roberts is the Treasurer of this committee. This committee filed quarterly disclosure reports with the Missouri Ethics Commission on July 14, 1997, October 12, 1997, and January 9, 1998. This committee received a contribution of \$1025 from plaintiff PAC on June 23, 1997, and an additional contribution of \$50 on February 25, 1998. This

committee would accept additional contributions from Plaintiff PAC but for the sanctions imposed by Missouri law for receiving contributions in excess of \$1075 for candidates in the primary election for state auditor.

17. Plaintiff Fredman cannot run an effective primary campaign unless his committee can accept immediately contributions in excess of \$1075 from plaintiff PAC and other contributions. The \$1075 contribution limit is so low that he cannot amass the resources necessary to mount an effective campaign, and it severely burdens both his ability to deliver his political message and political dialogue on the issues to be raised in the campaign for state auditor.

Civil Rights Violations

18. The Missouri statutes limiting political campaign contributions, Mo. Stat. Ann. §§ 130.032.1, 130.032.2, 130.032.3, 130.032.7 (West. Supp. 1998) violate Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

19. These statutes currently cause Plaintiffs immediate and irreparable harm, and Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray this Court to enter judgment in their favor against Defendants, as follows:

A. By the entry of a temporary restraining order prohibiting Defendants, their successors, agents, and other persons acting in concert with them from implementing, enforcing, or acting in reliance upon the statutory provisions herein challenged;

B. By the entry of a preliminary injunction prohibiting Defendants, their successors, agents, and other persons acting in concert with them from implementing, enforcing, or

acting in reliance upon the statutory provisions herein challenged;

C. By the entry of a permanent injunction prohibiting Defendants, their successors, agents, and other persons acting in concert with them from implementing, enforcing, or acting in reliance upon the statutory provisions herein challenged;

D. By the entry of a declaratory judgment holding that the statutory provisions herein challenged violate Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution;

E. By the award of all attorneys' fees and costs to Plaintiffs, pursuant to 42 U.S.C. § 1998; and

F. By the entry of such other orders as the Court may deem appropriate and just under the circumstances.

D. BRUCE LA PIERRE

[Address omitted]

/s/

PATRIC LESTER

[Address and verifications omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

[Caption Omitted]

**AFFIDAVIT OF PLAINTIFF ZEV DAVID FREDMAN
IN SUPPORT OF PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Comes now Affiant, Zev David Fredman, and states:

1. I am a named Plaintiff in the above entitled cause.
2. I am a registered voter and resident of St. Louis County, Missouri.
3. I am an active candidate in the 1998 Republican Party primary for the office of Missouri State Auditor, and, I intend to file, as required by state law before March 31, 1998, to run in the Republican primary on August 5, 1998 and to pay the \$200 filing fee.
4. The statutes challenged in this cause prevent me from marshaling sufficient assets to conduct a meaningful statewide campaign for the office of Missouri State Auditor and from expressing my political opinions to the Missouri electorate, and they severely burden political dialogue on the issues raised in the campaign for Missouri State Auditor.
5. I have now a special opportunity to participate successfully in the Republican primary for state auditor. Margaret Kelly, a Republican and the incumbent Auditor, has decided not to run for re-election, and another formidable opponent, Republican State Senator Peter Kinder (Cape

Girardeau) has also decided against participating in the primary election. My window of opportunity, however, is small. Kelly proposed Charles Pierce, a CPA and a seventeen year employee of the Auditor's office, at the Lincoln Days gathering of the Missouri Republican Party over Presidents' Day weekend, February 14-15, 1998. Moreover, many other candidates with statewide ambitions will consider running for state auditor because it is one of only two statewide elections in 1998.

6. I need a large amount of seed money immediately in order to present my candidacy to voters who are likely participants in the Republican primary and to make it more difficult for other candidates to attract these voters. Pierce is a first-time candidate for statewide political office, and, if I can act promptly, I will be able to compete with him on an equal footing.

7. If I raise a significant amount of seed money quickly, I will be able to use it to raise additional funds for my statewide campaign, to promote my candidacy to party insiders, and to gain an advantage in the primary race. Party leaders consider candidates with money more seriously than candidates who have few resources, and acceptance by party leaders is a key to success in primaries. I must raise substantial sums immediately in order to present my candidacy to Republican Party leaders who are in the process of anointing another candidate, Charles Pierce, and to discourage other potential candidates from entering the primary.

8. The 1998 Republican primary for State Auditor will be very expensive. For example, the Missouri Ethics Commission reported that Margaret Kelly, the Republican candidate for State Auditor in the uncontested August 1994 Republican primary election for State Auditor, spend a total of \$135,136.

9. I am not a professional politician. I am a first-time candidate for statewide political office, and I do not have either a vast network of political contacts or a well-established base of contributors. Instead, I am a private businessman, and I must continue to manage my business while I mount my campaign for State Auditor. I do not have time to raise the seed money necessary for my statewide campaign by asking a large number of contributors for small contributions. I must, instead, depend on contributions of more than \$1075 made by plaintiff PAC and others.

10. The campaign for the Republican nomination for the office of State Auditor has already begun. I need immediately to an additional contribution from Plaintiff PAC in order to raise the seed money necessary to mount an appeal to other potential contributors and to advance my candidacy to Republican Party leaders who are now considering Charles Pierce and other potential candidates.

/s/ _____
ZEV DAVID FREDMAN
Affiant

[Dated March 2, 1998; Jurat Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

[Caption Omitted]

**AFFIDAVIT OF RUSSELL ROBERTS
IN SUPPORT OF PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Comes now Affiant, Russell Roberts, and states:

1. I am Treasurer of "Fredman for Auditor," a candidate committee.

2. As Treasurer of this committee, I accepted a contribution of \$1025 from Shrink Missouri Government PAC on June 23, 1997, and I accepted another contribution of \$50 from Shrink Missouri Government PAC on February 25, 1998.

3. As Treasurer of "Fredman for Auditor," I would accept an additional contribution from Shrink Missouri Government PC but for the sanctions imposed by Missouri law, Mo. Stat. Ann. §§ 130.032.1, 130.032.3, 130.032.7, 130.081 (West 1997 & Supp. 1998), for accepting contributions in excess of \$1075 for candidates in the primary election for state auditor.

/s/ _____
RUSSELL ROBERTS
Affiant

[Dated March 2, 1998; Jurat Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

[Caption Omitted]

**AFFIDAVIT OF PLAINTIFF SHRINK
MISSOURI GOVERNMENT PAC,
A POLITICAL ACTION COMMITTEE,
IN SUPPORT OF PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Comes now Affiant, Shrink Missouri Government PAC, a political action committee, by and through its Treasurer, and states:

1. It is a political action committee, duly organized and existing under the laws of the State of Missouri, with its principal place of business within the metropolitan St. Louis area.

2. During the 1994, 1996, and 1997 elections, it made contributions to candidates for Missouri elective office, and it continues in operation for the purpose of making similar contributions in the future.

3. Shrink Missouri Government PAC made a contribution of \$1025 to "Fredman for Auditor," a candidate committee, on June 23, 1997, and it contributed an additional \$50 on February 25, 1998.

4. Shrink Missouri Government PAC intends to make another contribution to "Fredman for Auditor," but this additional contribution is prohibited by Mo. Ann. Stat. §§ 130.032.1(1), 130.032.3, 130.032.7, 130.081 (West 1997 & Supp. 1998).

5. Shrink Missouri Government PAC is a conduit between contributors to political campaigns and candidates who, in the opinion of the Treasurer and other leaders of the PAC, support the political viewpoints and goals of the PAC and the contributors. Many individuals contribute to the PAC because they rely on the Treasurer and other PAC leaders to investigate and evaluate candidates. Many PACs operate in the same fashion as Shrink Missouri Government PAC.

6. Shrink Missouri Government PAC, its Treasurer, and other leaders believe that Zev David Fredman's candidacy for State Auditor promotes the political viewpoints and goals of the PAC and its contributors.

7. The PAC would contribute more than \$1075 to Mr. Fredman but for the contribution limits of Mo. Stat. Ann. §§ 130.032.1, 130.032.3, 130.032.7 (West Supp. 1998), and these limits severely burden the PAC's ability to promote its political viewpoints and goals to express support for candidates through campaign contributions. The PAC would also make contributions to other candidates in excess of \$525 and \$275 limits but for the contribution limits of the Missouri statutes.

8. The burden on the PAC is severe because Mr. Fredman needs seed money immediately in order to compete effectively in the Republican primary campaign and because his ability to attract other contributions is a function of his ability to raise seed money.

9. The contribution limits are so low that they prevent Mr. Fredman from amassing resources necessary for effective political advocacy, and, if the primary candidacy of Mr. Fredman fails, the PAC and its contributors may be left without a candidate in the November 1998 general election who will advocate their political viewpoints and goals.

SHRINK MISSOURI GOVERNMENT PAC

By /s/ _____
 W. BEVIS SCHOCK
 President

[Dated March 2, 1998; Jurat Omitted]

 UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF MISSOURI

 [Caption Omitted]

 ANSWER OF DEFENDANTS
 ADAMS, FLOOD, GARDNER, HARDER,
 HOWALD, SPIELBUSCH, AND NIXON

The above-named defendants answer the numbered paragraphs of the plaintiffs' complaint as follows:

1. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1; thus those allegations are denied.

2. The defendants admit that plaintiff PAC is registered with the Missouri Ethics Commission as a continuing committee. Otherwise, the defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 2; thus those allegations are denied.

3. The defendants admit that defendants Adams, Flood, Gardner and Spielbusch are members of the Missouri Ethics Commission. Defendants deny that defendant Harder is a member of the Missouri Ethics Commission and that defendant Howald is the chairman of the Missouri Ethics Commission, on grounds that the terms of Harder and Howald on the Missouri Ethics Commission expired on March 15, 1998.

4. Admitted.

5. Admitted.

6. These defendants deny that for purposes of venue any of them reside in St. Louis County, Jefferson County, or any other county in the Eastern District of Missouri. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation regarding defendant McCullough's residency; thus that allegation is denied.

7. The first sentence of this paragraph consists of contentions of law that do not require an answer. The second sentence consists of the plaintiffs' characterization of their complaint, which does not require an answer. As to the third sentence, these defendants deny that defendants Flood and Howald, having been sued in their official capacities, are residents of this judicial district and division for purposes of establishing venue. The defendants admit that all defendants reside in Missouri. Otherwise, the third sentence consists of contentions of law that do not require an answer. To the extent that the plaintiffs' contentions of law and characterization contained in paragraph 7 require an answer, the defendants deny those allegations.

8. The defendants admit that legislation amending Chapter 130, RSMo., was adopted by the 1994 Missouri General Assembly as Senate Bill 650, and by the people of Missouri by initiative on November 8, 1994. Otherwise this paragraph consists of the plaintiffs' characterization of those amendments. The defendants neither admit nor deny that characterization, but refer the Court to the amendments themselves. Otherwise any allegations in paragraph 8 are denied.

9. The defendants admit that the court of appeals issued an opinion in *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996). Otherwise this paragraph con-

sists of the plaintiffs' characterization of that decision. The defendants neither admit nor deny that characterization, but refer the Court to the decision itself.

10. The defendants admit that the court of appeals issued an opinion in *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996). Otherwise this paragraph consists of the plaintiffs' characterization of that decision. The defendants neither admit nor deny that characterization, but refer the Court to the decision itself.

11. The defendants admit the allegations of the fourth sentence of this paragraph. Otherwise, this paragraph consists of contentions of law that do not require an answer. To the extent an answer is required, the defendants deny the remaining allegations of paragraph 11.

12. This paragraph consists of contentions of law that do not require an answer. To the extent an answer is required, the defendants deny the allegations of paragraph 12.

13. The defendants admit that the only contributions reported by plaintiff PAC in 1994, 1995, 1996, 1997, and 1998 total the amounts stated. Otherwise the defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13; thus those allegations are denied.

14. The defendants admit that reports filed by plaintiff Fredman and plaintiff PAC for the quarter including June 23, 1997, show a contribution of \$1025 from PAC to Fredman. Otherwise the defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13; thus those allegations are denied.

15. The defendants admit that before March 31, 1998, plaintiff Fredman filed with the Missouri Secretary of State as a candidate for Auditor. The defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 15; thus those allegations are denied.

16. The defendants admit that reports filed by plaintiff Fredman show that he formed a candidate committee, "Fredman for Auditor." Those reports also name Russell Roberts as treasurer of the committee. The defendants admit the allegations of the second sentence of this paragraph. The defendants also admit that the report for the second quarter of 1997 shows a \$1025 contribution from PAC to Fredman, and that those reports show no other contributions to plaintiff Fredman by anyone during 1997. Otherwise the defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16; thus those allegations are denied.

17. Denied.

18. This paragraph consists of contentions of law that do not require an answer. To the extent an answer is required, the defendants deny the allegations of paragraph 18.

19. Denied.

Wherefore, the above-named defendants pray that this Court deny the relief sought; dismiss plaintiffs' complaint; grant the costs herein expended by defendants; and for such other relief as the Court deems just and proper.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

/s/

JAMES R. LAYTON
Chief Deputy Attorney General

PAUL MAGUFFEE
MARY ERICKSON
Assistant Attorneys General

[Address and Certificate of Service Omitted]

Campaign Finance Data from Recent Elections

Data as reported by the Federal Election Commission
and the Missouri Ethics Commission, based on
candidate filings

Governor '92	Primary	General	Total
D—Daprin	\$60,509.73		
D—Schoeml	\$2,371,794.93		
D—Rogers	\$5,504.50		
D—Carnahan	\$1,404,503.74	\$2,430,054.48	\$3,834,558.22
D—Subtotal	\$3,842,312.90		
R—Webster	\$3,279,009.00	\$1,848,816.13	\$5,127,825.13
R—Blount	\$2,015,206.00		
R—Bailey	\$348,945.05		
R—Watts	\$6,970.00		
R—Subtotal	\$5,650,130.05		
Totals	\$9,492,442.95	\$4,278,870.61	\$8,962,383.35
		Total	\$13,771,313.56
		Avg candidate	\$1,721,414.19
		Avg for candidates not in statewide office	\$611,164.79
	\$2,000 as a percentage of the major party candidates' total expenditures		0.02%
Governor '96	Primary	General	Total
D—Carnahan	\$630,873.11	\$2,571,288.42	\$3,202,161.53
R—Kelly	\$244,880.26	\$653,671.32	\$898,551.58
Totals	\$875,753.37	\$3,224,959.74	\$4,100,713.11
		Total	\$4,100,713.11
		Avg candidate	\$2,050,356.56
	\$2050 as a percentage of the major party candidates' total expenditures		0.05%

Lt Gov '92	Primary	General	Total
D—Wilson	\$497,985.29	\$621,715.23	\$1,119,700.52
D—Ross	\$8,206.60		
D—Rice	\$67,859.12		
D—Pisani	\$231,413.20		
D—Subtotal	\$805,464.21		
R—Kelly	\$157,371.02	\$386,331.88	\$543,702.90
R—Stubblefield	\$3,183.99		
R—Subtotal	\$160,555.01		
Totals	\$966,019.22	\$1,008,047.11	\$1,663,403.42
		Total	\$1,974,066.33
		Avg Candidate	\$329,011.06
		Avg candidate not in statewide	\$286,072.66
	\$2000 as a percentage of the major party candidates' total expenditures		0.10%

Lt Gov '96	Primary	General	Total
D—Wilson	\$122,400.85	\$984,729.16	\$1,107,130.01
R—Kenney	\$102,165.14	\$793,143.00	\$895,308.14
Totals	\$224,565.99	\$1,777,872.16	\$2,002,438.15
		Total	\$2,002,438.15
		Avg Candidate	\$1,001,219.08
		Avg candidate not already statewide	\$895,308.14
	\$2050 as a percentage of the major party candidates' total expenditures		0.10%

Sec State '92	Primary	General	Total
D—Moriarty	\$21,092.54	\$127,732.69	\$148,825.23
D—Wagner	\$144,314.00		
D—Quinn	\$50,431.74		
D—Subtotal	\$215,838.28		
R—Hancock	\$61,778.95	\$188,429.27	\$250,208.22
R—Kilby	\$108,244.04		
R—Parker	\$50,564.43		
R—Strickoff	\$52,970.34		
R—Subtotal	\$114,749.29		
Totals	\$330,587.57	\$316,161.96	\$399,033.45
		Total	\$646,749.53
		Avg Candidate	\$92,392.79
		Avg candidate not in statewide	\$92,392.79
	\$2000 as a percentage of the major party candidates' total expenditures		0.50%

Sec State '96	Primary	General	Total
D—Cook	\$182,493.50	\$927,372.79	\$1,109,866.29
D—Askew	\$4,503.00		
D—Subtotal	\$186,996.50		
R—Hancock	\$55,557.53	\$649,098.87	\$704,656.40
Totals	\$242,554.03	\$1,576,471.66	\$1,814,522.69
		Total	\$1,819,025.69
		Avg Candidate	\$606,341.90
		Avg candidate not previously run statewide	\$557,184.65
		Avg candidate not in statewide	\$354,579.70
	\$1025 as a percentage of the major party candidates' total expenditures		0.11%

Treasurer '92	Primary	General	Total
D—Holden	\$372,123.99	\$165,754.44	\$537,878.43
D—La Page	\$425,742.41		
D—Welch	\$56,030.01		
D—Subtotal	\$853,896.41		
R—Melton	\$33,574.81	\$27,334.09	\$60,908.90
R—Holloway	\$11,020.51		
R—Subtotal	\$44,595.32		
Totals	\$898,491.72	\$193,088.53	\$598,787.33
		Total	\$1,091,580.26
		Avg Candidate	\$218,316.05
		Avg candidate not in statewide	\$218,316.05
	\$2000 as a percentage of the major party candidates' total expenditures		0.33%

Treasurer '96	Primary	General	Total
D—Holden	\$92,062.17	\$326,843.88	\$418,906.05
R—Bearden	\$11,735.59	\$38,642.47	\$50,378.06
Totals	\$103,797.76	\$365,486.35	\$469,284.11
		Total	\$469,284.11
		Avg Candidate	\$234,642.06
		Avg candidate not in statewide	\$50,378.06
	\$2050 as a percentage of the major party candidates' total expenditures		4.07%

AG '92	Primary	General	Total
D—Nixon	\$520,120.18	\$774,349.22	\$1,294,469.40
D—Wolf	\$286,580.67		
D—Quitno	\$362,601.69		
D—Reardon	\$100,652.40		
D—Subtotal	\$1,269,954.94		
R—Steelman	\$629,633.16	\$779,544.34	\$1,409,177.50
R—Hall	\$662,039.80		
R—Subtotal	\$1,291,672.96		
Totals	\$2,561,627.90	\$1,553,893.56	\$2,703,646.90
		Total	\$4,115,521.46
		Avg Candidate	\$685,920.24
		Avg candidate not in statewide	\$685,920.24
	\$2000 as a percentage of the major party candidates' total expenditures		0.05%

AG '96	Primary	General	Total
D—Nixon	\$132,083.25	\$598,452.74	\$730,530.99
R—Bredemeier	\$46,531.85	\$168,554.47	\$215,086.32
Totals	\$178,615.10	\$767,007.21	\$945,622.31
		Total	\$945,622.31
		Avg Candidate	\$472,811.15
		Avg candidate not in statewide	\$215,086.32
	\$2050 as a percentage of the major party candidates' total expenditures		0.21%

Samples of Recent U.S. Senate and House Races Outside Missouri

Race	Reason for selection	Total spent by major party candidates	\$2000 as a percentage of average amount spent
House-Wyoming-1996	Smallest constituency (481,000)	\$949,987.00	0.4211%
Senate-Wyoming-1996	same	\$2,183,516.00	0.1832%
Senate-Wyoming-1994	same	\$1,781,326.00	0.2246%
Senate-California-1994	Largest constituency (31,362,000)	\$44,376,874.00	0.0090%
House-Georgia-1996	Most expensive 1994 House race	\$6,852,466.00	0.0584%
House-Missouri-1996	Second most expensive House race	\$2,658,373.00	0.1505%
Senate-North Carolina-1996	Most expensive Senate race	\$19,677,060.00	0.0203%

Recent U.S. Senate and House Races in Missouri

	Republican	Democrat	Total	\$2000 as a percentage of average amount spent
Senate 1994 (Ashcroft)	\$4,063,927.00	\$3,505,701.00	\$7,569,628.00	0.0528%
Senate 1992 (Bond)	\$5,022,431.00	\$1,112,187.00	\$6,134,618.00	0.0652%
House 1996-Hulshoff	\$686,450.00	\$542,368.00	\$1,228,818.00	0.3255%
Emerson	\$806,205.00	\$831,533.00	\$1,637,738.00	0.2442%
Blunt	\$985,764.00	\$103,747.00	\$1,089,511.00	0.3671%
Danner	\$112,970.00	\$0.00	\$112,970.00	3.5408%
McCarthy	\$220,339.00	\$0.00	\$220,339.00	1.8154%
Skelton	\$770,607.00	\$316,989.00	\$1,087,596.00	0.3678%
Gephart	\$3,110,509.00	\$62,504.00	\$3,173,013.00	0.1261%
Talent	\$1,165,814.00	\$381,873.00	\$1,547,687.00	0.2585%
Clay	\$383,850.00	\$77,978.00	\$461,828.00	0.8661%

Average Congressional Spending and Comparison to
Contribution Limits For Recent Elections

Campaign	Number of Candidates	Total Net Disbursements	Average Disbursements per Candidate	\$2,000 as % of Avg. Disb.
1991/92 Election Cycle: House General Election Campaigns	1,300	\$332,689,465	\$255,915	0.782%
1991/92 Election Cycle: Senate General Election Campaigns	146	\$195,901,342	\$1,341,790	0.149%
1993/94 Election Cycle: House General Election Campaigns	1,108	\$343,842,612	\$310,327	0.644%
1993/94 Election Cycle: Senate General Election Campaigns	139	\$272,466,906	\$1,960,194	0.102%
1995/96 Election Cycle: House General Election Campaigns	4	\$424,803,698	\$306,939	0.652%
1995/96 Election Cycle: Senate General Election Campaigns	143	\$226,012,457	\$1,580,507	0.127%

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

[Caption Omitted]

AFFIDAVIT

Affiant, Joseph A. Carroll, states as follows:

1. I am a Senior Field Investigator with the Missouri Ethics Commission. My duties include review and auditing of campaign finance reports that are filed with the Missouri Ethics Commission. I supervise other staff members of the Missouri Ethics Commission who share responsibilities for reviewing and auditing campaign finance reports that are filed with the Missouri Ethics Commission.

2. I have knowledge of the following facts and would testify to them as true.

3. My staff and I have reviewed the campaign finance reports filed with the Missouri Ethics Commission by candidates for statewide offices in the elections held in 1996 and we have tabulated the total expenditures reported by those candidates for those elections.

4. The list attached to this Affidavit as Exhibit A presents the results of our review and tabulation and, to the best of my knowledge and information, presents the total expenditures reported to the Missouri Ethics Commission by candidates for statewide offices in elections held in 1996.

/s/ _____
JOSEPH A. CARROLL

[Dated March 4, 1998; Jurat Omitted]

1996 PRIMARY ELECTION

GOVERNOR

Edwin W. Howald (D)
exemption filed
 Mel Carnahan (D)
 \$630,873.11
 Ruth Redel (D) *exemption filed*
 Nicholas Clement (D)
exemption filed
 John M. Swenson (R)
exemption filed
 Margaret Kelly (R)
 \$244,880.26
 David Andrew Brown (R)
exemption filed
 Lester W. (Les) Duggan, Jr. (R)
exemption filed
 J. Mark Oglesby (L) \$3,826.26
 Martin Lindstedt (L)
exemption filed

LIEUTENANT GOVERNOR

Roger B. Wilson (D)
 \$122,400.85
 Bill Kenney (R) \$102,165.14
 Jeanne Bojarski (L)
exemption filed

SECRETARY OF STATE

James J. Askew (D) \$4,503.00
 V. Marvalene Pankey (D)
exemption filed
 Rebecca McDowell (Bekki)
 Cook (D) \$182,493.50
 John Hancock (R) \$55,557.53
 LaDonna Higgins (L)
exemption filed

STATE TREASURER

Bob Holden (D) \$92,062.17
 Carl Bearden (R) \$11,735.59
 Jaques Tucker (L)
exemption filed

1996 GENERAL ELECTION

Mel Carnahan (D) \$2,571,228.42

Margaret Kelly (R) \$653,671.32

J. Mark Oglesby (L) \$3,767.40

Roger B. Wilson (D) \$984,729.16

Bill Kenney (R) \$793,143.18
 Jeanne Bojarski (L) \$792.52

R.M. (Bekki) Cook (D)
 \$927,372.79
 John Hancock (R) \$649,098.87
 LaDonna Higgins (L)
exemption filed

Bob Holden (D) \$326,843.88
 Carl Bearden (R) \$38,642.47
 Jaques Tucker (L)
exemption filed
 David Young (T)
exemption filed

ATTORNEY GENERAL

Jeremiah W. (Jay) Nixon (D)	J. W. (Jay) Nixon (D)
\$132,083.25	\$598,452.74
Mark Bredemeier (R) \$46,531.85	Mark Bredemeier (R)
	\$168,554.47
	Kimberly Lowe (T)
	<i>exemption filed</i>

[Exhibit A]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

[Caption Omitted]

AFFIDAVIT

Before me, the undersigned authority, personally appeared Evelyn Lietzow who first being duly sworn on her oath states:

1. I am employed as a legal assistant with the Missouri Office of Attorney General.

2. I obtained from public records maintained by the Missouri Ethics Commission photocopies of all campaign finance disclosure reports filed by candidates for Secretary of State in the 1992 elections and candidates for Auditor in the 1994 elections. These reports total several hundred pages.

3. I reviewed every report of each candidate for Secretary of State who ran in the 1992 general election and, for each candidate, I listed which named contributors gave aggregate contributions of \$2,000 or less and which named contributors gave aggregate contributions of more than \$2,000. I excluded contributors identified as political party committees for a state, county, district, city, or other area. For each candidate, I then added the total number of named contributors, the number of named contributors who made aggregate contributions of \$2,000 or less, and the number of named contributors who made aggregate contributions of more than \$2,000.

4. I found that candidates for Secretary of State who ran in the 1992 general election listed 669 named con-

tributors, 659 of which made aggregate contributions of \$2,000 or less, and 10 of which made aggregate contributions of more than \$2,000. Accordingly, 98.51% of the contributors made aggregate contributions of \$2,000 or less and 1.49% of the contributors made aggregate contributions of more than \$2,000.

5. In addition to amounts of contributions from named contributors, the reports I reviewed for Secretary of State candidates reported amounts of non-itemized contributions, which were totals of individual contributions of less than \$100 and were not attributed to named contributors. I listed and totaled the amounts of non-itemized contributions reported on all reports filed by candidates for Secretary of State who ran in the 1992 general election. The total amount of such non-itemized contributions was \$72,372.

6. In addition, the reports I reviewed for Secretary of State candidates reported amounts of contributions received through fundraisers, which were not attributed to named contributors. I listed and totaled the amounts of fundraiser contributions reported on all reports filed by candidates for Secretary of State who ran in the 1992 general election. The total amount of such fundraiser contributions was \$49,547.

7. I reviewed every report of each candidate for Auditor who ran in the 1994 general election and, for each candidate, I listed which contributors gave aggregate contributions of \$2,000 or less and which contributors gave aggregate contributions of more than \$2,000. I excluded contributors identified as political party committees for a state, county, district, city, or other area. For each candidate, I then added the total number of contributors, the number of contributors who made aggregate contributions of \$2,000 or less, and the number of con-

tributors who made aggregate contributions of more than \$2,000.

8. I found that candidates for Auditor who ran in the 1994 general election listed 1,973 contributors, 1,926 of which made aggregate contributions of \$2,000 or less, and 47 of which made aggregate contributions of more than \$2,000. Accordingly, 97.62% of the contributors made aggregate contributions of \$2,000 or less and 2.38% of the contributors made aggregate contributions of more than \$2,000.

9. In addition to amounts of contributions from named contributors, the reports I reviewed for Auditor candidates reported amounts of non-itemized contributions, which were totals of individual contributions of less than \$100 and were not attributed to named contributors. I listed and totaled the amounts of non-itemized contributions reported on all reports filed by candidates for Auditor who ran in the 1994 primary and general elections. The total amount of such non-itemized contributions was \$123,648.

10. In addition, the reports I reviewed for Auditor candidates reported amounts of contributions received through fundraisers, which were not attributed to named contributors. I listed and totaled the amounts of fundraiser contributions reported on all reports filed by candidates for Auditor who ran in the 1994 primary and general elections. The total amount of such fundraiser contributions was \$82,470.

/s/ _____
EVELYN LIETZOW

[Dated April 3, 1998; Jurat Omitted]

STATE OF MISSOURI
MISSOURI ETHICS COMMISSION
P. O. BOX 1254
JEFFERSON CITY, MISSOURI 65102

January 30, 1998

NEWS RELEASE

Mr. John Howald, Chairman of the Missouri Ethics Commission announced today new contribution limits for those candidates running for elected office. Mr. Howald stated the new limits are:

\$1,075.00 State-wide office candidates, and candidates running for an office in a district, ward, or other unit, with a population of over 250,000 people;

\$525.00 State Senate candidates, and candidates running for office in a district, ward, or other unit, with a population of 100,000 to 250,000 people;

\$275.00 State House of Representatives candidates and candidates running in a district, ward, or other unit, with a population less than 100,000.

Mr. Howald further stated the Missouri Ethics Commission must review the contribution limits every two years and adjust those limits to reflect the growth in the Consumer Price Index. The Commission last reviewed the contribution limits in 1996. The new limits become effective January, 1998 and will remain in effect until 2000. Mr. Howald urged those persons with questions concerning contribution limits to contact the Missouri Ethics Commission at 1/800-392-8660.

[Caption Omitted]

**AFFIDAVIT OF PLAINTIFF ZEV DAVID FREDMAN
IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

Comes now Affiant, Zev David Fredman, and states:

1. I am a candidate for Missouri Auditor in the 1998 Republican primary. I have formed a candidate committee, filed for office, and paid the filing fee.
2. In the past I have made contributions to candidates and groups (including Shrink Missouri Government Foundation) that had views consistent with my own, but, until recently, I did not believe that the time was ripe to run for office.
3. In the spring of 1997, at the suggestion of W. Bevis Schock, I began to consider running for the office of Missouri State Auditor.
4. Schock told me that Shrink Missouri Government PAC would make the maximum legal contribution to my candidate committee and that it would like to make a larger contribution.
5. Schock also told me that, if necessary in its judgment, Shrink Missouri Government PAC would consider raising a First Amendment challenge to the Missouri campaign contribution limits.
6. I believe that I can wage an effective campaign for Auditor if I can raise funds in increments of more than \$1075, and I have friends who I believe would make such contributions if they were legal. Thus, I believe that the success of my candidacy will be determined in part by the outcome of this case. My participation in this lawsuit is consistent with my views that state regulations, including campaign finance regulations, must be reduced.

7. I am in the race to win, but I also know that merely by filing I will have an opportunity in public forums and in the media to make my views known. Therefore, I believe that my candidacy regardless of the ultimate outcome will promote my political ideas.

/s/ _____
ZEV DAVID FREDMAN
Affiant

[Dated April 13, 1998; Jurat Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

[Caption Omitted]

**AFFIDAVIT OF PLAINTIFF SHRINK
MISSOURI GOVERNMENT PAC,
A POLITICAL ACTION COMMITTEE,
IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

Comes now Affiant, Shrink Missouri Government PAC, a political action committee, by and through its Treasurer, and states:

1. Shrink Missouri Government PAC (the PAC) is a Missouri Political Action Committee, and it is duly registered as a continuing committee with the Missouri Ethics Commission and is in good standing.
2. Shrink Missouri Government PAC has been active in the Missouri political system from the early to mid-1990's, and it has participated more actively in some elections than others.
3. Andy Rothweiler, the owner of a successful temporary service firm (ProTemps), George Schoedinger, an orthopedic surgeon, and Bruce Schlafly, an orthopedic surgeon specializing in hand surgery, are some of the individuals who are actively involved in PAC.
4. W. Bevis Schock is the sole officer of the PAC, and Schock, in consultation with Rothweiler, Schoedinger, Schlafly and others, has taken a leadership role.
5. The title of the PAC states its goal: To Shrink Missouri Government.

6. The PAC tries to achieve its objective primarily by raising money from citizens and making contributions to candidates who it believes will, if elected, try to shrink Missouri's government.

7. When the PAC forms a good faith belief that a campaign finance law unconstitutionally impedes its ability to take the political actions that it desires to take, the PAC will assert its First Amendment rights in litigation.

8. The PAC believes that First Amendment litigation challenging state campaign finance regulations is entirely consistent with its overall objective of shrinking Missouri's government and regulatory apparatus.

9. Throughout the history of the PAC, Schock and others have held occasional strategy meetings to discuss political issues and to decide which candidates to back and which candidates to shun.

10. The PAC has frequently addressed the problem of ensuring that the candidates who receive contributions will in fact pursue the objective of shrinking Missouri government, and in 1994 the PAC gave money only to candidates who returned a form and identified the state governmental program(s) that they would work to eliminate if they were elected.

11. Schock and others decided that forming a PAC is preferable to identifying candidates who support its political objectives and encouraging donors to give directly to those candidates because making contributions through the conduit of a PAC with a Strong name like Shrink Missouri Government effectively communicates the PAC's objectives and makes it a significant participant in the political process.

12. The PAC has frequently addressed the question how it can grow and become stronger given the pressures

of time and the difficulty of raising money. Although it has never successfully answered this question, obtaining donations in larger amounts would both ease time pressures and possibly increase the PAC's influence.

13. The PAC has generally supported Republican candidates, on the theory that in the long run the Republican party is more likely to try to shrink Missouri government than the Democrat party.

14. In the 1996 statewide elections, Margaret Kelly was the Republican candidate for governor, but the PAC did not make a contribution to her campaign because it believed that Ms. Kelly would not act in a manner completely consistent with the PAC's objective. The PAC concluded from its perspective that her campaign effort was a disaster, that she failed to campaign aggressively, and that she utterly failed to promote its objective of shrinking Missouri government.

15. In 1996 the Republicans, including Kelly, lost every statewide race, and the PAC decided that it would like to find a candidate who would run in 1988 for Auditor, the only 1998 non-federal statewide race.

16. The PAC did not know whether Ms. Kelly would run for reelection as Auditor, and as it considered its options, Zev Fredman came to mind. Mr. Fredman had previously contributed to Shrink Missouri Government Foundation, a related organization, and the PAC believed that he supported "Shrink's" objectives and that he had the proper accounting background to serve as Auditor.

17. Schock, as a citizen and as Treasurer of the PAC, approached Fredman about running for Auditor of the State of Missouri.

18. In discussions about his candidacy, the PAC stated that it would like to give him more than \$1000 (now \$1075), but that in order to make a contribution in this amount the PAC might have to participate in a First Amendment challenge to Missouri's campaign finance laws.

19. Mr. Fredman expressed interest in running for State Auditor, and he formed his campaign committee with the PAC's help. The PAC gave him the maximum contribution it could under the law. Mr. Fredman decided to run because he wants to be Auditor, and he recognized that he might have to participate in a First Amendment challenge to Missouri's campaign finance regulations in order to advance his candidacy.

20. After Fredman formed his candidate committee and after the PAC made its initial contribution to Fredman, the PAC learned that Peter Kinder, a Missouri State Senator from Cape Girardeau, was considering a run for State Auditor. Kinder has no accounting background, but he is extremely well-respected in Republican circles, and he also has a voting record consistent with the PAC's objectives. When Kinder first mentioned running, the PAC viewed him as a threat to Mr. Fredman, and, if his campaign had become serious, the PAC might have shifted its support to Mr. Kinder. The PAC did not have to reach a decision because Mr. Kinder dropped out of the race.

21. At the February 1998 state Republican meeting, known as Lincoln Days, Margaret Kelly encouraged Republican leaders to support her assistant, Mr. Charles Pierce, in a bid for Auditor. Many Republican leaders have now given Mr. Pierce their support.

22. Shrink Missouri Government PAC believes that Mr. Pierce is likely to be "Margaret Kelly all over again," and it continues to support Mr. Fredman.

23. Even though Mr. Pierce may have a better chance of winning, Mr. Fredman will have opportunities in the course of his campaign to express his views at public forums and in the media. The PAC expects that Mr. Fredman will express political views that are completely consistent with the PAC's objectives. Moreover, Mr. Fredman's candidacy may catch fire with the voters, and any number of other events could well lead to Fredman's election as Auditor in November 1998.

24. Mr. Fredman needs more money to move his campaign forward more aggressively, and the more money he raises, the more money he will be able to raise.

25. The PAC believes that Mr. Fredman should solicit money and support from party leaders, but he needs more money in order to obtain the appropriate mailing lists, to print his literature, and to mail it.

26. Shrink Missouri Government PAC would like to give Mr. Fredman more money than \$1075 that it has already contributed to his campaign.

27. Schock has historically been the Shrink Missouri Government PAC representative who makes phone calls to solicit contributions to the PAC, and he had raised funds as needed for particular candidates and not on an on-going basis.

28. Shock has not yet engaged in fund raising for the PAC in order to give money to Mr. Fredman because the PAC, under Missouri law, cannot make any additional lawful contributions to Mr. Fredman's candidate committee.

29. Shock believes that he can raise substantial sums if the PAC receives the right to contribute more than \$1075, and he will try to raise more money if the contribution limit is held unconstitutional.

SHRINK MISSOURI GOVERNMENT PAC

By: /s/ _____
W. BEVIS SCHOCK
Treasurer

[Dated April 13, 1998; Jurat Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

[Caption Omitted]

AFFIDAVIT OF SENATOR WAYNE GOODE

I, Wayne Goode, being duly sworn, state the following, which is based upon my personal knowledge and belief:

1. I am over the age of 18 years and competent to make this affidavit.
2. The statements made herein are made on my personal knowledge. If called upon, I am competent to testify as to the matters stated herein.
3. I was first elected to the Missouri House of Representatives in 1962, and I served in the Missouri House until 1984.
4. I was elected to the Missouri Senate in 1984, and I have served as a state senator since that date.
5. In 1993, I was co-chair of the Interim Joint Committee on Campaign Finance Reform.
6. The campaign contribution limits proposed in SB 650, now codified at § 130.032.1 RSMo., were the work product of the Interim Joint Committee. A broad spectrum of opinions were heard on the issue of campaign contribution limits. The members of the Committee discussed among ourselves at length not only what it cost to run a campaign and deliver a message to the populace, but also at what point is there the potential for contributions to become unduly influential.

7. My views on running an effective campaign come from my own experience of raising money and running campaigns for state legislative races for the last thirty-six years. Most of the other senators and representatives on the Committee had similar experiences of numerous campaigns over the years.

8. The Committee heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence. Balancing these two concerns, the Committee reached the contribution limits of \$1000, 500, and \$250 by consensus.

9. I believed in 1993 and I believe today that contributions over those limits have the appearance of buying votes as well as the real potential to buy votes. The greater the contribution, the greater potential there is for the appearance of and the actual buying of votes. It was the consensus of the Committee, and I concurred, that the limits we set forth in the bill balanced the need to run an effective campaign with the appearance of buying votes.

10. I believe that the experience in the three elections since the law was enacted have demonstrated that the limits are sufficient to run an effective campaign and for a candidate to get his or her message heard.

11. I believe that the experience in the last three elections has also shown that the appearance of corruption because of campaign contributions has decreased in state elections. Imposing limits prevents the disproportionate funding of a particular campaign and, therefore, prevents the potential for buying influence.

Further affiant saith naught.

/s/ _____
WAYNE GOODE

[Dated April 20, 1998; Jurat Omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

[Caption Omitted]

AFFIDAVIT OF JOHN W. MAUPIN

I, John W. Maupin, being duly sworn, state the following, which is based upon my personal knowledge and belief:

1. I am over the age of 18 years and competent to make this affidavit.

2. The statements made herein are made on my personal knowledge. If called upon, I am competent to testify as to the matters stated herein.

3. I was appointed to the Missouri Campaign Finance Review Board, the predecessor to the Missouri Ethics Commission, by Governor John Ashcroft, and I served on the Board from August 23, 1991 through December 31, 1992. On May 6, 1993, I was appointed by Governor Mel Carnahan to the Missouri Ethics Commission, on which I served until March 15, 1996. I served as the Chairman of the Commission from March 15, 1994 through March 15, 1996.

4. I believe that the three tier approach and their respective limits for campaign contribution limits are reasonable to run a campaign at the various levels. Missouri needed the campaign contribution limits to counter the blatant cynicism among the populace that the large contributions by a few contributors curried favor with Missouri elected officials.

5. Since the enactment of § 130.032.1 RSMo., the perception of corruption in our government has definitely improved as a result of the campaign contribution limits.

6. The campaign contribution limits are in the state's and the people's interest to make sure that people in Missouri realize that the government is not for sale. Nobody in the public would believe that you could curry political favor for \$1000, 500, and \$250, at the respective levels of government.

Further affiant saith naught.

/s/ _____
JOHN W. MAUPIN

[Dated April 17, 1998; Jurat Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2351 EMSL

SHRINK MISSOURI GOVERNMENT PAC
and ZEV DAVID FREDMAN,
Appellants,

v.

RICHARD ADAMS, *et al.*,
Appellees.

AFFIDAVIT

My name is W. Bevis Schock and I am the Treasurer of Shrink Missouri Government PAC. I hereby verify and affirm that, under penalty of perjury the following is a true and accurate statement.

1. Shrink Missouri Government PAC is a Missouri Political Action Committee duly registered with the Missouri Ethics Commission and in good standing.
2. I am the treasurer of Shrink Missouri Government PAC.
3. Since the order of the United States Court of Appeals for the 8th Circuit, July 23, 1998, in case number 98-2351, *Shrink Missouri Government PAC, et al. v. Richard Adams, et al.* I have been actively raising funds for two candidates, Zed Fredman, seeking the Republican nomination for State Auditor, and Alexander Hasler, Republican, unopposed in the

primary, challenging Joan Bray, also unopposed in the primary, for the state representative seat for the 84th District.

4. I have two checks in hand, one from:

Larry Bradford	\$200.00
30 Leno Pl.	
St. Louis, MO 63108	

George Schoedinger, III, M.D.	\$275.00
6 Babler Lane	
St. Louis, MO 63124	

Richard F. Huck, III	100.00
5 Glenmary Rd.	
St. Louis, MO 63132	

5. Since the ruling the PAC has made contributions to Fredman in the amount of \$100.00 and Hasler in the amount of \$325.00.
6. Since July 23, 1998 I have been actively making phone calls and personal contacts in an attempt to raise more money to make more contributions.
7. I expect to raise more money and to contribute another \$225.00 to Hasler and substantially more to Fredman.
8. I do not know how much I will ultimately be able to raise for Fredman, but hope to raise funds in the range of \$5000.00. (This attempt will be made more difficult because of the proximity of the election and the recency of the court order nullifying the contribution limits).
9. Shrink Missouri Government PAC will have after the deposit and clearing of checks, a bank balance of less than \$200.00.

I hereby verify and affirm that I have read and understood this document. I declare under oath and under

penalty of perjury that to the best of my knowledge all the statements in the document are true and correct.

/s/ _____

W. BEVIS SCHOCK

Treasurer

Shrink Missouri Government PAC

[Jurat Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AFFIDAVIT

My name is Alexander Hasler. I hereby verify and affirm the following:

1. I am a registered voter residing at 1409 Claytonia Terrace, Richmond Heights, St. Louis County, Missouri.
2. On or about February 24, 1998 I filed as a candidate for the 1998 Republican nomination for Missouri State Representative for the 84th District.
3. I have a properly formed campaign committee: "Citizens to Elect Hasler for State Representative."
4. I am the Treasurer of my campaign committee.
5. No other candidates have filed in the Republican primary for the 84th District.
6. The primary election is on August 4, 1998.
7. Joan Bray is the incumbent in the 84th District. She is a Democrat and is running unopposed in the primary.
8. On July 25, 1998 my committee has a campaign contribution for the primary election from Shrink Missouri Government PAC in the amount of \$275.00.
9. Pursuant to the order of the United States Court of Appeals for the 8th Circuit, July 23, 1998, in case number 98-2351, *Shrink Missouri Government PAC, et al. v. Richard Adams, et al.*, on July 25, 1998 my committee accepted a 2nd campaign contribution

for the primary election from Shrink Missouri Government PAC in the amount of \$50.00.

10. W. Bevis Schock, as Treasurer of Shrink Missouri Government PAC, has offered to contribute another \$225.00 for the primary election, but the offer is contingent upon him raising the further funds.
11. Assuming Shrink Missouri Government PAC follows through on its offer, my committee will accept the additional \$225.00 contribution.
12. W. Bevis Schock, as Treasurer of Shrink Missouri Government PAC, has also offered to made a contribution of \$275.00 after August 4, 1998 for the general election.
13. I expect to accept that contribution.
14. W. Bevis Schock, as Treasurer of Shrink Missouri Government PAC, has offered to contribute (after August 4, 1998) another \$100.00 for the general election (in addition to the \$275.00 mentioned above for the general election).
15. Barring a court order changing the substance of the July 23 court order, my committee will accept those funds.
16. In 1996 I ran unsuccessfully in the Republican primary for the United States Congress for the 1st Congressional District.
17. For the last five years I have been active in Republican party affairs. Particularly, I have participated in the St. Louis County Young Republicans, the St. Louis County Pachyderms, and the Republican Liberty Caucus.

18. My general election campaign against Joan Bray will be vigorous and hard fought. We expect to clash on such issues of (from my perspective):
 - a) Campaign finance reform responsive to the 1st Amendment.
 - b) School choice with local parental control, and
 - c) Lower Taxes and the need to reduce government size before solving social ills through government action.
19. Joan Bray has a vast and statewide network of political supporters and contributors. There is reason to expect that she will be well financed and well able to present to the public her view of the above issues, and/or other issues.
20. In order to mount an effective campaign and match her promulgation of her ideas, I need substantial campaign funds.
21. My ability to accept sums larger than \$275.0 per contributor per election helps my ability to raise those funds and participate in the political debate.
22. Therefore, the court order of July 23 nullifying Missouri's limits on campaign contributions has increased the political dialogue on the issues in the campaign for the State Representative seat for the 84th District.

/s/

ALEXANDER HASLER

Date 7/26/98

[Jurat Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AFFIDAVIT

My name is W. Bevis Schock and I am the Treasurer of Shrink Missouri Government PAC. I hereby verify and affirm that, under penalty of perjury, the following is a true and accurate statement:

1. Shrink Missouri Government PAC is a Missouri Political Action Committee duly registered with the Missouri Ethics Commission and in good standing.
2. I am the treasurer of Shrink Missouri Government PAC.
3. I wrote an affidavit on Saturday, July 25, 1998 describing the fund raising activities I had undertaken between Thursday, July 23, 1998, the date of the order of the United States Court of Appeals for the 8th Circuit in case number 98-2351, *Shrink Missouri Government PAC, et al. v. Richard Adams, et al.* and Saturday, July 25, 1998.
4. This affidavit is an update to that affidavit, and describes the fund raising activities in which I engaged after Saturday, July 25, 1998.
5. After the decision of the Court of Appeals I decided to focus on the campaign of Zev Fredman instead of the campaign of Alex Hasler.
6. Mr. Fredman had opposition in the August 4, 1998 primary, and Mr. Hasler did not.
7. I made approximately seven contacts by phone and in person with potential donors.

8. In each case I focused on the need to promote the message of our PAC, "to shrink Missouri Government," and stated that I believed Mr. Fredman's views were consistent with that message.
9. I ended up receiving contributions from only two donors:

H. F. Langenberg 20 Lenox Pl. St. Louis MO 63108	\$100.00
Bruce Schlafly, III, M.D. 12315 Federal St Louis, MO 63131	\$200.00
10. I believe the lateness of my calls in terms of the date of the election hurt the efforts to raise money for Mr. Fredman.
11. I delivered a check to Mr. Fredman for \$300.00 on July 30, 1998. That contribution essentially emptied out the PAC's account in his favor.
12. I received the check from Mr. Langenberg later the same day.
13. Further, earlier that week I consulted with Mr. Fredman regarding two other donations he expected to receive from leads generated by him. He expected the contributions to total \$750.00.
14. We decided that we would ask his donors to make their checks payable to Shrink Missouri Government Pac instead of to Fredman for Auditor.
15. We decided to proceed in this manner because Mr. Fredman and I believe that acting through our PAC, with its distinctive name, helps promote our political objective as defined by our title.

David Kingsley	\$500.00
-----------------------	-----------------

17. On July 31, 1998 I deposited those checks, plus Mr. Langenberg's check into the PAC account and simultaneously contributed \$850.00 to Mr. Fredman's campaign.
18. After the opinion of the Court of Appeals on July 23, 1998, Mr. Fredman and I had several discussions regarding the content of his radio advertising.
19. On his own counsel and on counsel from me and others, he changed the copy of his radio ads so that it would mention his role in the thus far successful the litigation to overturn contribution limits. The ads focused on Mr. Fredman's commitment to the First Amendment.
20. Mr. Fredman and I believed this issue would lead voters in Missouri to vote for him over his opponent.
21. His ads on this subject (and other subjects) ran on the day before the election.
22. Despite best efforts, Mr. Fredman lost the election.

I hereby verify and affirm that I have read and understood this document. I declare under oath and under penalty of perjury that to the best of my knowledge all the statements in the document are true and correct.

W. BEVIS SCHOCK
Treasurer
Shrink Missouri Government PAC

[Dated August 5, 1998; Jurat Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AFFIDAVIT OF ZEV DAVID FREDMAN

Comes now Affiant, Zev David Fredman, and states:

1. I made a good faith effort, consistent with the demands of operating my family business and under the constraints imposed by the Missouri's \$1075 limit on campaign contributions, to win the Republican nomination for the office of state auditor.
2. I am not a professional politician. As a first-time candidate for statewide political office, and I did not have either a vast network of political contacts or a well-established base of contributors. Instead, I am a private businessman. I had to continue to manage my business while I mounted my campaign for state auditor, and I did not have the time to raise the money necessary for my statewide campaign by asking a large number of contributors for small contributions. Instead, I intended to rely on contributions of more than \$1075 made by Shrink Missouri Government PAC and others, but I was precluded from employing this campaign strategy until July 23, 1998, just twelve days before the primary election when the United States Court of Appeals for the Eighth Circuit enjoined enforcement of the state campaign contribution limits.
3. With little time left before the election and no judicial relief then in sight, I decided on July 23, 1998 to run a commercial on the Missouri Network in order to obtain statewide coverage. As I was traveling to record my campaign statement, I received a telephone call from counsel

and learned that the court of appeals had enjoined enforcement of the contribution limits.

4. After entry of the injunction pending appeal, I made my best possible efforts to raise large contributions necessary to finance the presentation of my political views to the electorate. I called many potential donors, but I had little success. I believe that I was not successful because many donors, at this late stage, had already decided to support my oponent Charles Pierce and because at least some of these donors were concerned about public statements that called into question the effectiveness of this Court's July 23, 1998 Order as a shield against enforcement of the state contribution limits.

5. I ultimately raised a total of \$4750 (Exhibit 1) and spent a total of \$3936 (Exhibit 2).

6. Portions of my basic campaign statement (Exhibit 3) were quoted in the VOTERS' GUIDE published by the St. Louis Post-Dispatch on August 2, 1998 (Exhibit 4).

7. I had two interviews on the Missouri Network: on Friday, July 31, 1998, and on Monday, August 3, 1998.

8. With the primary only a few days away and with little money, I decided that radio was the only way to get my message out. I ran one spot (Exhibit 5) two times on Friday, July 31, 1998 on the Missouri Network (stations throughout the state) and then again three times on Monday, August 3, 1998 on the same stations.

9. My best potential buys, Rush Limbaugh on KMOX-St. Louis and KMBZ-Kansas City, were closed out to my campaign because those two stations were not taking any political advertising beyond the requirements imposed by federal law for federal candidates. I obtained a listing of

Rush Limbaugh's stations throughout the State, and I bought time on the following stations to run a second spot (Exhibit 6) on Monday, August 3, 1998:

a. WDAF, Kansas City, 10 thirty second spots during the morning drive. WDAF is a country station that runs "news only" in the morning, and I believe that it has a conservative audience.

b. KWTO, Springfield, 9 thirty second spots during the Rush Limbaugh and Dr. Laura programs and during a popular "sports talk" show.

c. KFRU, Columbia, 8 thirty second spots during the day and including the Rush Limbaugh program.

d. KFEQ, St. Joseph, 9 thirty second spots during the Rush Limbaugh program and on morning drive.

e. KQYZ, Joplin, 9 thirty second spots during the Rush Limbaugh, Dr. Laura, and Ollie North Shows.

f. KWOS, Jefferson City, 12 thirty second spots during the Rush Limbaugh and Dr. Laura programs.

g. KZIM, Cape Girardeau, 4 thirty second spots on Rush Limbaugh on August 3, 1998, and four more on August 4, 1998.

10. I concentrated my expenditures for the second spot on Kansas City because my first spot on the Missouri Network reached the whole state (including KTRS in St. Louis) except for Kansas City, and I decided that Kansas City needed some extra time on my second buy.

11. Although I lost the Republican primary election for state auditor, I had the support of approximately twenty percent of the voters and received over 40,000 votes. But for the campaign contribution limits, which burdened my campaign efforts until just twelve days before the elec-

tion, I believe that I could have done substantially better,
and perhaps even won the nomination.

/s/ _____
ZEV DAVID FREDMAN
Affiant

[Dated August 5, 1998; Jurat Omitted]

APR 12 1999

No. 98-963

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN, and JOAN BRAY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONERS

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5188

QUESTION PRESENTED

Whether the court of appeals erred in declaring that Missouri's campaign contribution limits for statewide office, which exceed the limits expressly approved by this Court for national elections in *Buckley v. Valeo*, 424 U.S. 1 (1976), violate the First Amendment?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are listed in the petition. Pursuant to Fed. R. App. P. 43(c)(1), Donald Gann and Michael Greenwell, newly appointed members of the Missouri Ethics Commission, are substituted for their predecessors, Ervin Harder and John Howald.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-963

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN, and JOAN BRAY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, Petitioners' Appendix ("App.") 1a-19a, entered on November 30, 1998, is reported at 161 F.3d 519 (8th Cir. 1998). The court of appeals' order entering an injunction pending appeal is reported at 151 F.3d 763 (8th Cir. 1998). App. 20a-23a. The opinion of the United States District Court is

reported at 5 F. Supp. 2d 734 (E.D. Mo. 1998). App. 24a-41a.

JURISDICTION

The court of appeals entered its judgment on November 30, 1998. The petition for certiorari was filed on December 11, 1998, and granted on January 25, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, as applied to the States through the Fourteenth Amendment. The statutory provision involved is Mo. Rev. Stat. § 130.032 (Supp. 1998). Both are set forth in the petition for certiorari.

INTRODUCTION

Headlines in every major newspaper in the United States and television broadcasts nearly every night reveal unmistakably a widespread perception of abuse and corruption in campaign financing. There is a real fear, perhaps stronger today than at any time in recent memory, that money is harmfully distorting the nation's political process. Not surprisingly, in such an environment, there is strong political pressure on legislators at all levels to adopt restrictions that will eliminate or at least deter pollution of the political process.

The court of appeals in this case has issued a First Amendment ruling that effectively overrules the decision that has been the foundation of campaign finance reform efforts for more than twenty years: *Buckley v. Valeo*, 424 U.S. 1 (1976). The ruling below seriously complicates an already complex process of reform by declaring all restrictions on campaign contributions subject to the

strictest form of judicial scrutiny; by requiring States somehow to prove that their citizens in fact perceive corruption in a system of unlimited campaign contributions; and by commanding States to prove that contribution limits are set at the precise point beyond which that perception of corruption occurs. At issue in this case, then, is the ability of any government to implement even the most minimal restrictions on campaign finance.

STATEMENT OF THE CASE

1. In July 1994, the Governor of Missouri signed into law Senate Bill 650, a package of campaign finance reforms enacted with strong bi-partisan support. Through this law, Missouri for the first time adopted limits on contributions to candidates for state and local offices, including per-election maximums of \$1,000 to a candidate for statewide office, \$500 to a candidate for state senate, and \$250 to a candidate for state representative. See Mo. Rev. Stat. § 130.032.1, .3 (Supp. 1998). The limits have been adjusted for inflation, and presently are \$1,075, \$525, and \$275. See *id.* § 130.032.2 and Joint Appendix ("J.A.") 37. Those who violate the limits are subject to sanctions. Mo. Rev. Stat. §§ 130.032.7, 130.081 (1994 and Supp. 1998).¹

The contribution limits were developed by the Joint Committee on Campaign Finance Reform, which included

¹ Senate Bill 650 also defined what the legislature found to be reasonable ceilings on candidates' campaign expenditures, set up a mechanism to persuade candidates to live within those ceilings, and banned contributions to any candidate for any state office during the annual five-month legislative session. Those provisions, which were invalidated in *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996), and *Shrink Missouri Government PAC v. Maupin*, 922 F. Supp. 1413 (E.D. Mo. 1996), are not at issue here. Other provisions of Senate Bill 650, principally relating to the disclosure of contributions, remain in force.

state legislators from both political parties with many years of experience in political campaigns. J.A. 46-47. The Committee heard testimony and deliberated at length on both the cost of an effective campaign and the level of contributions that might potentially buy influence or create a "political debt" for a candidate. The Committee reached a consensus that the limits in Senate Bill 650 were necessary to serve the State's overriding interest in avoiding actual and potential corruption in the election process and in government, yet permitted contributions large enough to allow candidates effectively to get their messages to potential voters. *Id.*

Even before the legislature took up Senate Bill 650, two bi-partisan groups of citizens began vigorous efforts to adopt campaign finance reforms by popular referendum. In November 1994, Missouri voters declared *their* perceptions (1) that large campaign contributions to candidates for state office tended to corrupt the election process and representative government, and (2) that limits significantly lower than those set in Senate Bill 650 were necessary to combat this evil. In Proposition A, Missourians placed limits on contributions to candidates by individuals or committees (other than contributions by candidates to their own committees) that ranged from \$100 to \$300 per "election cycle" (*i.e.*, the entire period between general elections for a particular office). The stricter, popularly-adopted limits preempted the limits set by the legislature. See 94 Mo. Op. Att'y Gen. 218 (1994).

The contribution limits in Proposition A were invalidated in *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).² That left Sen-

² Like Senate Bill 650, Proposition A also contained other campaign finance reforms that were held to be invalid. See *Shrink*

ate Bill 650 as the only source of limits on contributions to candidates for state and local office in Missouri. These limits took effect in January 1995, and governed all state office elections held in 1996, including those for governor, lieutenant governor, secretary of state, treasurer, attorney general, and the state legislature, as well as other elections held in 1995 and 1997. And they governed the 1998 campaigns for the state legislature and state auditor—until late last July.

2. On March 2, 1998, just days before the close of candidacy filings and three years after Senate Bill 650 took effect, Shrink Missouri Government Political Action Committee ("Shrink PAC") and Zev David Fredman filed this action against those charged with enforcing the contribution limits. Fredman, a candidate for state auditor, alleged that he could not run an effective primary campaign without accepting contributions in excess of \$1,075 per election. Shrink PAC, which had already contributed \$1,075 to Fredman, asserted that, but for the limits, it would contribute more to Fredman and would contribute similar large sums to other unidentified candidates for state and local office.

Claiming infringement of their First Amendment rights, Fredman and Shrink PAC moved to enjoin enforcement of the contribution limits. The district court denied their motion for a temporary restraining order. The parties then filed cross-motions for summary judgment; and, on May 12, 1998, the court granted summary judgment to petitioners.

The district court assumed, first (as Eighth Circuit precedent required, see App. 5a), that strict judicial

Missouri Government PAC v. Maupin, 71 F.3d 1422, 1429 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

scrutiny of the contribution limits was the proper standard of review. App. 30a. It then explained that “[i]f a showing of ‘real harm’ is required (the state claims it is not), the Court finds that defendants here have made that showing.” *Id.* The court observed that the State has a compelling interest in eliminating or at least ameliorating the public perception that large contributions corrupt the election and governance process. Although Missouri neither collects nor preserves legislative history for its enactments, the district court noted that the State provided evidence that, in enacting Senate Bill 650, the legislature was responding directly to the reality and the perception that campaign contributions buy influence in government. *Id.* 31a. Specifically, the court credited the affidavit of the state senator who co-chaired the interim Joint Committee on Campaign Finance Reform. J.A. 46-47. The senator’s sworn assertions were corroborated with contemporaneous newspaper stories and editorials.³

Relying on *Buckley v. Valeo*, 424 U.S. 1 (1976), the district court explained that “[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent

³ The district court cited: Jo Mannies, *Auditor Race May Get Too Noisy To Be Ignored*, St. Louis Post-Dispatch, Sept. 11, 1994, at 4B (reporting that a candidate for state auditor received a \$40,000 contribution from a St. Louis-based brewery and \$20,000 from a St. Louis bank); John A. Dvorak, *Election Reform Backed Lid on Contributions to Campaigns Wins Carnahan’s Support*, Kansas City Star, Nov. 14, 1993, at B1 (quoting Governor Carnahan as stating, “We need a system that will make sure that our democratic institutions care as much about John Doe and Jane Doe as they do about any big company or any wealthy individual”); Editorial, *The Central Issue is Trust*, St. Louis Post-Dispatch, Dec. 31, 1993, at 6C (noting questions raised by the state treasurer’s decision to handle most of the state’s banking business through a bank that had contributed to his 1992 election campaign). App. 31a n.6.

in a regime of large financial contributions.” App. 31a-32a (internal quotations omitted). And, while the court did not believe that *Buckley* requires a poll of the citizenry to establish that the “state’s election process is facing a perceived threat,” it noted that Proposition A could be viewed as such a poll, one that plainly showed that the public indeed has such a perception. *Id.* 32a & n.7. In addition, the court noted, “members of the legislature are uniquely qualified to gauge whether allowing those contributions to go unchecked endangers our democratic system of government, and, if so, to prescribe an appropriate remedy therefor.” *Id.* 32a. The district court concluded that Missouri’s interest in enacting contribution limits was as compelling—and at least as fully demonstrated—as the federal interest asserted in *Buckley*.

The court also rejected Fredman and Shrink PAC’s argument that the contribution limits were “too low to allow meaningful participation in protected political speech and association.” *Id.* 36a (internal quotation omitted). Relying again on this Court’s analysis in *Buckley* and comparing expenditures in elections before and after Senate Bill 650 took effect, the district court found no evidence that the limits prevented candidates from obtaining the resources they needed to speak effectively. *Id.* 37a (detailing, *inter alia*, that in 1992, when Missouri had no contribution limits, the seven candidates for secretary of state spent \$647,000, while in 1996, the three candidates spent \$1,819,000). The court noted that Missouri’s contribution limits were entirely in line with the limits judged necessary by numerous other state legislative bodies. *Id.* 37a n.11. The court also found that, even prior to enactment of the limits, only 3% of those who contributed more than \$100 to a single candidate for state auditor made *aggregate* contributions to that candidate in excess of \$2,000 (*i.e.*, the unadjusted \$1,000 each for the primary

and general elections authorized by Senate Bill 650). Thus “there is no reason to believe that Missouri’s contribution limits have any ‘dramatic adverse effect’ on funding campaigns for state office” or that they significantly burden individual speech and association rights. *Id.* 39a.

Finally, the court concluded that invalidating Missouri’s contribution limits would be inconsistent with—indeed, an improper overruling of—*Buckley*. *Id.* The court explained that, before discarding the *Buckley* holding that a \$1,000 limit is constitutional, a court would have to consider a host of changes in circumstance, not merely the effect of inflation on the present value of \$1,000 (*e.g.*, whether the consumer price index accurately reflects changes in the costs associated with campaigning; whether technological advances have rendered campaign speech less expensive; and whether the average Missourian, with a median household income of \$31,046, considers \$1,000 a large contribution). *Id.* In light of all the circumstances, the court concluded that *Buckley* should not be overruled, and that the considered judgment of the Missouri legislature regarding campaign contribution limits should be accepted under the holding in *Buckley*.

3. Respondents appealed, and sought an injunction pending appeal. On July 23, 1998, a mere twelve days before the Missouri primary elections, the court of appeals enjoined enforcement of the limits pending its decision. Petitioners immediately sought rehearing *en banc*. When the court of appeals did not timely rule, petitioners sought a stay from the Circuit Justice, which was denied. The court of appeals *en banc* denied the motion for rehearing on August 20, and the case was argued August 21, 1998.

On November 20, 1998, the Eighth Circuit issued its 2-1 decision, holding unconstitutional, *inter alia*, a contribution limit higher than the one affirmed by this Court in *Buckley*, which governs all federal elections to this day. The court of appeals first stated that Missouri’s contribution limits are subject to strict scrutiny. The court agreed that States have a compelling interest in eliminating public perceptions of corruption. But the court refused to accept either the Missouri legislature’s judgment that a public perception of corruption exists or the evidence of such a perception cited by the district court. The court instead required some additional “demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place” before Missouri could even avoid summary judgment against it. App. 5a.

In the court’s principal opinion, Chief Judge Bowman also argued that the contribution limits do not withstand scrutiny under the “least restrictive means” test as it had been defined and applied in Eighth Circuit decisions beginning with *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995). He characterized *Buckley*’s \$1,000 limit as “something of a benchmark,” but nevertheless rejected Missouri’s limits as unconstitutionally “heavy-handed” in light of inflation over the past 25 years. App. 8a.

Judge John Gibson dissented. He pointed out that the evidence of a compelling state interest in *Buckley* was no different than the proof in this case, and concluded that “the State has adequately justified the contribution limits at issue.” App. 14a. He also explained that the limits at issue are not “differen[t] in kind” from the limits approved in *Buckley*. *Id.* 11a. In his view, the court of appeals was bound by this Court’s decision in *Buckley*

“unless and until the Supreme Court declares otherwise.”
Id. 19a.

SUMMARY OF ARGUMENT

At issue in this case are limitations on direct contributions to candidates for state and local political offices, most centrally a \$1,075 limitation on contributions to candidates for statewide offices. The considered judgment of the State of Missouri—expressed through the enactment of a law by the citizens’ elected representatives and through a citizens’ referendum—is that limits on contributions to candidates for state and local offices are necessary to ensure the integrity of the State’s political process.

But respondents claim, and the court of appeals held, that the contribution limitations enacted violate the First Amendment of the Constitution, as applied to the States through the Fourteenth Amendment. This Court’s decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), however, governs the disposition of this case, and demonstrates that both respondents and the court below are wrong. Like the federal campaign contributions limit at issue in *Buckley*, Missouri’s limits on contributions to candidates for state and local office only marginally affect the First Amendment rights of contributors and candidates. The limits clearly and appropriately serve the public’s vital interest in preventing the reality and appearance of corruption and in fostering confidence in Missouri’s representative government and do not unduly burden First Amendment rights. Thus, under *Buckley*, Missouri’s law is plainly constitutional.

As explained in *Buckley*, the speech and associational rights of contributors are only modestly affected by limits on direct contributions to candidates. This is because: (1) the act of contributing to a candidate constitutes

only “symbolic” speech; (2) contribution limits “involve[] little direct restraint on [a contributor’s] political communication”; and (3) there are numerous effective alternative ways for a contributor to convey support for a candidate. 424 U.S. at 21. *Buckley* further states that a \$1,000 contribution limit does not undermine “to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.” *Id.* at 28-29. The overall effect of such a limit is simply to require candidates “to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression.” *Id.* at 22. The empirical evidence concerning contributors and campaigns in Missouri confirms what *Buckley* holds—that contribution limits only modestly affect First Amendment rights. In these circumstances, as *Buckley* makes clear, strict scrutiny is not the standard. Part I.A.

Buckley’s flat refusal to examine the propriety of the federal limit under a “narrow tailoring” or “least restrictive alternative” test provides further confirmation that strict scrutiny is not applied to contribution limits. This Court explained that courts may not second guess or fine tune legislative judgments imposing contribution limits: “If it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000.” *Id.* at 30. *Buckley* establishes that courts must uphold limits as long as they are reasonable and there is no evidence that they in fact impose undue burdens on protected First Amendment activities. Part I.B.

Although Missouri’s limits are not subject to strict scrutiny, they indisputably serve a compelling public in-

terest in assuring the integrity of government and of the election process, protecting from both the appearance and reality of corruption. The court of appeals—while noting the compelling nature of Missouri’s interest in enacting contribution limits—was of the view that a State can act to further that interest only where there is “demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place” before doing so. App. 5a. *Buckley* is to the contrary. *Buckley* recognizes that a regime of large direct political contributions “inherent[ly]” creates an appearance of corruption that undermines public confidence in the political process. 424 U.S. at 27. The fundamental reality recognized in *Buckley*—that government officers who receive money appear to be in debt to the donor—is reflected not only in campaign finance law, but also in a vast array of federal and state conflict of interest laws. And *Buckley* further makes absolutely clear that government may act to limit campaign contributions based on the assumption that a regime of unlimited contributions gives rise to corruption or its appearance, without waiting for actual damage to representative government to occur. *Id.* at 30. Part II.A-B.2.

In any event, although not required to do so, Missouri presented evidence of a public perception of corruption fully warranting its imposition of reasonable contribution limits. Part II.B.3.

Buckley thus makes clear that courts must uphold reasonable contribution limits absent evidence that they unduly restrict protected First Amendment activities—*i.e.*, as long as they are not “differen[t] in kind” from the limits affirmed in *Buckley*. As long as a \$1,000 contribution limit is not qualitatively different in its effect on the contributor’s symbolic speech and on the candidates’ ability to communicate with voters, such a limit is as constitu-

tional in 1999 as it was in 1976. The burden of proof is squarely on those who seek to invalidate a contribution limit. Part III.A.

Here, respondents plainly failed to carry their burden. Indeed, they offered little more than speculation that the effects of inflation since 1976 render a limit of \$1,075 constitutionally “different in kind” from the \$1,000 federal limit upheld in *Buckley*. Respondents entirely failed to show that the effects of inflation are such that a previously constitutional limit now operates to negate or cripple the First Amendment rights at stake. To the contrary, Missouri demonstrated, and the district court found, that Missouri’s limits do not significantly affect, let alone cripple or unduly burden First Amendment rights. Part III.B.

ARGUMENT

This Court’s decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), disposes of this case in petitioners’ favor. Missouri has enacted into law content-neutral limitations on campaign contributions to candidates for state and local political office that only modestly and indirectly affect the constitutional rights to speak and associate. Missouri’s reasonable contribution limits plainly and appropriately serve the vital public interest in preventing corruption and the appearance of corruption and in protecting the electorate’s confidence in Missouri’s system of representative government, without unduly burdening First Amendment rights. Accordingly, under *Buckley*, Missouri’s law is clearly constitutional.

I. MISSOURI’S CONTRIBUTION LIMITS HAVE ONLY A MARGINAL EFFECT ON FIRST AMENDMENT RIGHTS AND ARE NOT SUBJECT TO STRICT SCRUTINY.

In *Buckley*, this Court provided the parameters to be used in evaluating the constitutionality of limits on direct

political contributions. The Court acknowledged the centrality of the First Amendment rights of speech and association to intelligent self-government in a democratic system and held that limits on *campaign expenditures* are subject to strict scrutiny because they substantially burden First Amendment rights.

But most critically here, the Court held that limits on *campaign contributions* to candidates or political committees have only a marginal effect on the First Amendment freedoms of contributors and candidates for political office. Content neutral laws with such minimal and incidental restrictive effects on constitutional rights are not subject to strict scrutiny. Indeed, this Court's express refusal to apply a "narrow tailoring" and "least restrictive means" test plainly confirms that strict scrutiny does not apply. We show in Part I that *Buckley's* recognition that contribution limits only modestly burden constitutional rights is firmly embedded in the principles of First Amendment law and that, based on this recognition, *Buckley* refused to apply strict scrutiny to laws enacting such limits, applying instead a balancing test which respects legislative judgments about the need for contribution limits so long as the limits do not unduly burden First Amendment freedoms.

A. Contribution Limits, At Most, Marginally Burden First Amendment Rights.

Critically, the *Buckley* Court first considered the extent of the burden that contribution limits impose on the First Amendment rights of contributors, political candidates and committees, and concluded that generally such limits impose little if any burden on protected activity. That conclusion is fully applicable to the limits established by Missouri law.

1(a). *Speech Rights of Contributors.* Shrink PAC, a contributor to campaigns for state and local office in Mis-

souri, argues that the Missouri limits abridge contributors' rights to free speech. But this Court expressly held that a \$1,000 limit on direct contributions to candidates for public office does not "in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21. The Court recognized that "contributions may *result in* political expression if spent by a candidate or an association to present views to the voters," but held that "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* (emphasis supplied). See *California Medical Ass'n v. FEC*, 453 U.S. 182, 196 (1981) (plurality opinion) (contributions to a candidate are "speech by proxy").

Contribution limits restrain only a single species of expressive conduct (direct contributions of money). But contributions of money convey only a "symbolic" or "general expression of support for the candidate and his views." *Buckley*, 424 U.S. at 21. The amount of a contribution provides only "a very rough index of the intensity of the contributor's support for the candidate." *Id.* Indeed, given the number of contributors who give comparable amounts to competing candidates, the gift may not even do that. And there are *no* restrictions on the ability of Shrink PAC and other contributors to engage in other more communicative conduct in support of a favored candidate, including the independent expenditure of unlimited funds to endorse individual candidates and their positions.⁴

For these sound reasons, the Court held in *Buckley* that "a limitation upon the amount that any one person

⁴ Cf., e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 297-98 (1984) (upholding the constitutionality of a law prohibiting sleeping in the public parks as part of a demonstration where the restrictive effect of the law is not severe and where speakers can readily shift to alternative ways to convey their message).

or group may contribute to a candidate or political committee entails only a *marginal restriction* upon the contributor's ability to engage in free communication." *Id.* at 20-21 (emphasis supplied).⁵

(b) *Associational Rights of Contributors.* *Buckley* also makes clear that contribution limits have only a mild effect on political contributors' freedom of association. 424 U.S. at 28-29. The effect is weak because a contribution is only one of many ways in which people may affiliate with a candidate. As *Buckley* explains, a multitude of alternative avenues remain available to those wishing to associate with candidates for political office and with others who support such candidates. Individuals may provide, without limit, volunteer services on their own, and they are "free to become . . . member[s] of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* at 22. Contributors are free to aggregate their direct contributions with those of others "to promote effective advocacy." *Id.* And, under current law, contributors are free alone or in combination with others, independently to expend *unlimited* money to associate themselves with candidates. Thus, contribution limits restrict (but do not preclude) only one type of associational act, by limiting the amounts that may be directly contributed to a candidate.⁶

⁵ The Court reaffirmed this point in *California Medical Ass'n v. FEC*, observing that "[i]f the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee, such as CALPAC, which advocates the views and candidacies of a number of candidates." 453 U.S. at 197.

⁶ And even this minimal restriction on an individual's ability to associate is offset by the fact that contribution limits "require can-

Because contribution limits have no effect at all on most avenues of association, and do not foreclose any avenue of association, reasonable limits such as Missouri's impose only the most minimal burdens on the constitutional right to associate.

2. *Preservation of Political Dialogue in the Aggregate.* *Buckley* makes equally clear that limits on direct contributions to candidates for office generally do not have a "severe impact on political dialogue" as a whole. 424 U.S. at 21. Specifically, *Buckley* held that "[t]he overall effect of the . . . contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Id.* at 21-22.

Missouri's contribution limit has the same effect as the federal limit upheld in *Buckley*. It encourages candidates to communicate with more voters and potentially re-engages some of the voters rendered apathetic and disinterested by the perception that the importance of one's views is directly proportional to the size of one's contribution. And again, individual Missouri citizens remain free independently to expend unlimited quantities of money expressing their support for any candidate—independent expenditures that broaden and strengthen, rather than weaken, public debate.

didates and political committees to raise funds from a greater number of persons," *Buckley*, 424 U.S. at 22, and thus indirectly increase associational activities in general. Indeed, this increase in the number of associational ties serves as a partial antidote to the belief of many voters that control over public governance has been sold to an elite group of high bidders.

3. *Empirical Evidence Confirms Buckley's Holding That a \$1,000 Contribution Limit Does Not Infringe First Amendment Rights.* Missouri showed, and the lower court found, that the practical impact of Missouri's law on contributors and candidates is negligible. That showing was not required by *Buckley*, which itself stands for the proposition that a \$1,000 contribution limit does not unduly infringe First Amendment rights and places on challengers the burden of demonstrating that their free speech and associational rights have been unduly burdened by a limit. But Missouri's showing is significant because it highlights, and explains, respondents' failure to bring forward evidence that contributors could no longer effectively communicate their support of, or associate with, candidates, or that candidates generally were unable effectively to campaign under Missouri's contribution regime.⁷

First, it is apparent that Missouri's limits could not conceivably be deemed to have had any effect on the overwhelming majority of Missouri citizens, or even on the extremely small subset of citizens who contribute to Missouri candidates. In 1992, fewer than 1% of all Americans contributed \$200 or more to candidates in federal elections.⁸ That same year, fewer than .3% of all Missouri residents made contributions of more than \$100 to

⁷ Respondents relied on mere speculation about the effects that inflation has had on a \$1,000 contribution. Such speculation, however, cannot serve as a substitute for concrete evidence of constitutional injury. Otherwise, the validity of *Buckley's* holding will simply float with the consumer price index, generating crippling uncertainty and substantially diminishing the dignity of an adjudication of constitutional rights. See Powell, *Stare Decisis and Judicial Restraint*, 1991 Journal of Supreme Court History 13, 16 (1991). See Part III, *infra*.

⁸ Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 Colum. L. Rev. 1160, 1166 n.15 (1994).

any general election candidate in a statewide race.⁹ And only a small percentage of these contributors made aggregate contributions in excess of \$2,000 to a candidate. For example, in the 1994 state auditor race—the last statewide campaign before limits took effect, and the office for which respondent Fredman later ran—a scant 1,973 persons (0.03% of the State's population) gave more than \$100 to general election candidates, and only 2.38% of this already elite group gave more than \$2,000. See J.A. 36. Likewise, in another race analogous to Fredman's (in that it involved no elected incumbents), only 1.49% of the 669 named contributors (*i.e.*, those who contributed at least \$100 to a single candidate) gave more than \$2,000 to the general election candidates for secretary of state in 1992. See J.A. 34-36.¹⁰ Indeed,

⁹ Missouri had a population of 5.189 million residents in 1992. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1997*, at 28 (117th ed.). Publicly available records on file with the Missouri Ethics Commission reveal that the combined total of named contributors (*i.e.*, those who contributed \$100 or more to a single candidate) for all candidates for governor, lieutenant governor, secretary of state, treasurer, and attorney general was a mere 14,410. This figure, moreover, actually overstates the number of individuals who made political contributions of more than \$100 in 1992, because some portion of the named contributors were corporations, proprietorships, and committees, and because some number of the individuals (and entities) listed by one candidate undoubtedly gave to candidates for other offices.

¹⁰ These figures are hardly surprising. In 1995, the national household average for all cash contributions—including contributions to all charitable, educational and religious institutions, political contributions and child support and alimony—was just \$925. *Statistical Abstract of the United States 1997, supra*, at 461. The national average household income that year was \$36,918. *Consumer Expenditure Survey 1995*. Average annual household expenditures that year for food, taxes, housing, utilities, transportation, pensions, insurance, clothing, and health care totaled \$32,637. *Statistical Abstract of the United States 1997, supra*, at 461. Thus, after paying for these necessities, the average household had ap-

Shrink PAC itself contributed only \$1,800 to multiple candidates in 1994. J.A. 9 (Complaint ¶ 13). Thus, Missouri's contribution limits affect only a minuscule number of Missouri citizens, who remain free to express their support for, and to associate with, candidates in a variety of ways, including the symbolic act of giving money in an amount that exceeds the contributions that the vast majority of contributors, let alone citizens generally, are willing or able to make.

Second, it is equally apparent that restricting Shrink PAC and others to contributions of \$2,150 per election cycle has not prevented Missouri candidates from amassing the funds necessary for political advocacy. In fact, on average, candidates operating under these limits amassed larger sums of money than candidates who ran for the same offices before the State adopted the limits, and spending in most contested races increased notwithstanding the statewide contribution limits. In four of five statewide races, average candidate expenditures *increased* between 1992 (the last election for most offices before the limits) and 1996 (after the limits took effect).¹¹ Indeed, in the race for secretary of state, average candidate expenditures increased more than six-fold, and in the race for lieutenant governor, they more than tripled. See note 11, *supra*. In addition, the amount of money spent

proximately \$4,281 to spend on *all* charitable and political donations. For the average household, therefore, a \$2,000 contribution would be 47% of all truly disposable income.

¹¹ Average candidate expenditures for the five races for which the State collected data are listed below. See J.A. 24-28.

	1992	1996
Governor	\$1,721,414	\$2,050,356
Lt. Governor	329,011	1,001,219
Secretary of State	92,392	557,184
Treasurer	218,316	234,642
Attorney General	685,920	472,811

by candidates in the general elections increased in three of the five races between 1992 and 1996.¹² Finally, the data reveal that total spending (on both primary and general elections) increased in two of the five races, and that the decrease in overall spending in the other three races was almost entirely attributable to the lack of competition in, and thus reduced spending on, party primaries.¹³

Plainly, notwithstanding Missouri's contribution limits, candidates are able to accumulate immense sums—sums more than adequate for “effective advocacy.” *Buckley*, 424 U.S. at 21. Missouri's experience with contribution limits, moreover, mirrors the nation's experience under the \$1,000 federal contribution limit. Notwithstanding that unadjusted limit, spending on federal elections has increased at a rate that exceeds the pace of inflation.¹⁴

¹² Between 1992 and 1996, total general election expenditures increased 76% in the race for lieutenant governor (from \$1,008,947 to \$1,777,872), 390% in the race for secretary of state (from \$316,162 to \$1,576,472), and 89% in the race for treasurer (from \$192,088 to \$365,486). See J.A. 24-28. Between 1992 and 1996, general election expenditures decreased 25% in the race for governor (from \$4,278,870 to \$3,224,959) and 51% in the race for attorney general (from \$1,553,893 to \$767,007), but enormous sums of money were nonetheless spent. *Id.*

¹³ In the governor's race, for example, 89% of the decrease in total spending was attributable to the fact that eight candidates spent \$9,492,442 on the 1992 primaries, whereas two unopposed primary candidates spent only \$875,753 on the 1996 primaries. Similarly, 75% of the reduction in spending on the 1996 race for attorney general was attributable to the fact that six candidates spent \$2,561,627 on the 1992 primaries, whereas two unopposed candidates spent just \$178,615 on the 1996 primaries. And *all* of the decline in total spending for treasurer was attributable to the fact that five candidates spent \$898,491 on the 1992 primary, whereas the two candidates who ran unopposed for their party's nomination in 1996 spent only \$103,797. See J.A. 24, 27-28.

¹⁴ According to respondents, the value of a 1976 dollar increased 284% between 1976 and 1997. Brief of Appellants at 41 n.25. Spending in United States Senate races, by contrast, increased more than

Again, Missouri is *not* required under *Buckley* to show that contributions are virtually unaffected or that campaign expenditures are rising in order to satisfy the test of constitutional validity. Instead, to establish a violation of their First Amendment rights, *respondents* were required to show that contributors are unable to communicate their support for, or to associate with, a candidate, and that candidates are unable to raise sufficient funds to engage in effective political advocacy. 424 U.S. at 21.¹⁵ Respondents, of course, made neither showing below, and the historical experience recited above amply demonstrates why: Missouri's limits (which henceforward increase with the rate of inflation) do not now, and in the future likely will not, restrain contributors' speech or have a "severe impact on political dialogue." *Id.*¹⁶

* * * *

500% between the 1976 and 1992 election cycles, from \$38.1 to \$210.8 million. See F. Wertheimer & S. Manes, *Campaign Finance Reform: Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1132 (1994) (citing Federal Election Commission statistics). Spending in United States House of Representative campaigns likewise increased more than 500% during this same period, from \$60.9 million to \$326.9 million. *Id.*

¹⁵ Others have made such showings. In *National Black Police Association v. District of Columbia Board of Elections*, 924 F. Supp. 270, 275-76 (D.D.C. 1996), *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997), for example, the plaintiffs demonstrated that limits of less than \$100 prevented effective political advocacy.

¹⁶ In an argument properly rejected by the court of appeals, respondents asserted that Missouri's contribution limits unduly infringe candidates' speech whenever a single candidate, unwilling to spend the time necessary to gather reasonable amounts from many contributors, cannot instead accept a few, large donations. But, as demonstrated in text, viable candidates are able to raise increasing amounts of money and to purchase space and time in the media to speak, despite the presence of limits, and *Buckley* upholds limits in such circumstances. See 424 U.S. at 22 (holding that candidates

Missouri's law mandating limits on contributions to candidates for government office has only a "narrow" and "limited" impact on First Amendment rights. What the Court said in 1976 applies equally today in Missouri:

The Act's \$1,0[75] contribution limitation focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties. *Buckley*, 424 U.S. at 28-29 (footnote omitted).

Missouri's law imposes only a "limited" burden on First Amendment rights. It does not undermine robust and effective political debate, and thus is not subject to strict scrutiny.¹⁷

do not have a constitutional right to gather funds in large lump sums). Indeed, respondent Fredman's speech was restricted not by Missouri's limits, but by his own conscious choices to procrastinate instead of raising funds and to eschew spending the funds he did raise.

¹⁷ *Buckley* is hardly unique in this approach to determining the proper level of judicial scrutiny. This Court has repeatedly employed a flexible analysis that upholds laws that minimally burden First Amendment rights while promoting fair elections. Thus, *Buckley*'s analysis of contribution limits is analogous to this Court's treatment of restrictions on ballot access, which likewise generally are not subject to strict scrutiny because they only marginally affect First Amendment rights. For example, in *Timmons v. Twin Cities*

B. *Buckley* Expressly Eschewed The "Narrow Tailoring" And "Least Restrictive Means" Tests Of Strict Scrutiny.

Once the *Buckley* Court concluded that the \$1,000 contribution limit only minimally affected First Amendment rights, it applied a balancing test in evaluating the constitutionality of that limit. This Court's rejection of strict scrutiny is made clear by its application of that balancing test to the law, but it is most evident in the Court's explicit refusal to conduct a narrow tailoring or least restrictive alternative analysis.

In *Buckley*, this Court firmly rejected the plaintiffs' demand that the government prove and the Court find an "exact" fit (a least restrictive alternative analysis) between

Area New Party, 520 U.S. 351, 362-363 (1997), this Court held that state laws precluding the candidate of one party from appearing on the ballot as the candidate for another party "limit, slightly, the party's ability to send a message to the voters and to its preferred candidates," in part because a party "retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate." See also *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions") (citation omitted); *Storer v. Brown*, 415 U.S. 724, 746 (1974) (upholding denial of ballot position to independent candidate if that candidate voted in the preceding primary or registered a party affiliation within the year proceeding); *American Party v. White*, 415 U.S. 767, 785-86 (1974) (upholding ballot access rules that reasonably serve important state interests). Cf. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (upholding a limit on attorneys' fees for certain proceedings, set in 1864, against a First Amendment claim that it unduly burdened the right to associate with the attorney of one's choosing, because "the process allows a claimant to make a meaningful presentation" and because "such a First Amendment interest would attach only in the absence of a 'meaningful' alternative").

the contribution limit and the elimination of the evil of perceived corruption. The Court did not require the government to put forth any evidence that the \$1,000 limit matched the evidence of actual or perceived corruption, and it held that courts shall not fine tune the legislatively chosen limit by asking "whether, say, a \$2,000 ceiling might not serve as well as \$1,000." 424 U.S. at 30.

The Court also rejected a specific argument that there was a better, less restrictive alternative for the prevention of corruption, *i.e.*, that "bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with proven and suspected *quid pro quo* arrangements." *Id.* at 27. The Court explained that such laws were laudable, but insufficient:

[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve . . . many salutary purposes . . . , Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system of permitting unlimited financial contributions. *Id.* at 27-28.

Buckley's analysis of the propriety of the federal limit is thus wholly inconsistent with the lower court's determination that contribution limits are subject to strict scrutiny. Instead, *Buckley* employed a balancing test to evaluate the constitutionality of contribution limits that impose only modest burdens on protected activities, and placed squarely upon respondents the burden of demonstrating that a particular contribution limit imposes an undue restraint on First Amendment rights. What we

have already said suffices to show that Missouri's laws impose no such restraint and should therefore be affirmed under *Buckley*.

II. ALTHOUGH NOT SUBJECT TO STRICT SCRUTINY, MISSOURI'S CONTRIBUTION LIMITS SERVE COMPELLING STATE INTERESTS.

Because contribution limits are not subject to strict scrutiny, Missouri need not demonstrate that its limits serve a compelling state interest. Nevertheless, as this Court has repeatedly held, contribution limits like Missouri's do in fact serve such an interest.

A. The States Have A Compelling Interest In Eliminating Or Reducing The Appearance Of Corruption That Arises From A Regime Of Large Campaign Contributions.

In *Burson v. Freeman*, 504 U.S. 191 (1992), this Court explained that the State "indisputably has a compelling interest in preserving the integrity of its election process." *Id.* at 199 (citation omitted). Most recently, in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), the lead opinion, in a passage questioned in none of the three other opinions, characterized as "'compelling'" the government's "interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." *Id.* at 609. See also *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 682 (1990) (Scalia, J., dissenting) ("a substantial risk of corruption which constitutes a compelling need for the regulation of speech . . . plainly exists when the wealth is given directly to the political candidate, to be used under his direction and control").

Democracies must fight the corruption of elected officials. "Corruption is a subversion of the political process.

Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985). When they do so, "the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26.¹⁸ See also *First National Bank of Boston v. Bellotti*, 436 U.S. at 765, 788 n.26 (1978); *FEC v. National Right to Work Committee*, 459 U.S. 197, 207 (1982).

But to protect the integrity of our election and governmental systems, States must also attack a problem "[o]f almost equal concern": "the impact of the *appearance* of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27 (emphasis supplied). See also *FEC v. National Right to Work Committee*, 459 U.S. at 210 ("we accept Congress' judgment that it is the *potential* for such influence that demands regulation") (emphasis supplied). A system that permits unlimited, direct contributions to candidates creates a public perception that both the election process and the decisions of elected officials are corrupt. Elected officials are perceived to be in debt to large contributors, and to make decisions, either consciously or unconsciously, based on that indebtedness rather than the public interest

¹⁸ The "payment of money to bias the judgment or sway the loyalty of persons holding positions of public trust is a practice whose condemnation is deeply rooted in our most ancient heritage." D. Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 13 Hofstra L. Rev. 301, 302 (1989). Elected officials should not be tempted to bypass the deliberative process essential to government by the prospect of personal gain. See D. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* 28 (The Brookings Institution, ed., 1995) (discussed in T. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comment. 127, 140 (1997)).

they are sworn to promote. The purse strings held by an elite group of wealthy contributors appear to voters as puppet strings, providing ultimate control and virtual invisibility. See *Buckley*, 424 U.S. at 25 ("corruption and the appearance of corruption [are] spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office").

In addition, a regime of unlimited contributions creates a public belief that access to an elected official and control over the public agenda are for sale, and available for a price that only a few can pay. Indeed, the public reasonably believes that "granting or denying access to an elected official's time based on levels of contributions" is "unavoidable so long as election campaigns are financed by private contributions." *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1991) (quoting *McCormick v. United States*, 500 U.S. 257, 272 (1991)).

Finally, the appearance of corruption is inextricably tied to confidence not just in individual officials, but in all of government. Indeed, "the avoidance of the appearance of improper influence 'is critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)). See also *United States v. Automobile Workers*, 352 U.S. 567, 575 (1957); *First National Bank of Boston v. Bellotti*, 435 U.S. at 799 (Burger, C.J., concurring). Thus, it is beyond dispute that the interest of the State in preserving confidence in government by eliminating corruption and the appearance of corruption is compelling.¹⁹

¹⁹ Indeed, the governmental interests served by limiting contributions are so weighty that they may be protected by additional,

B. Missouri Is Not Required To Offer Empirical Proof That There Is An Appearance Of Corruption In A Regime Allowing Large Contributions.

The State's interest in attacking the appearance of corruption is so compelling that this Court in *Buckley* found it "unnecessary to look beyond the [Federal Election Campaign] Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation" upheld in *Buckley*, 424 U.S. at 26. The court of appeals, however, held that to enact a \$1,075 contribution limit, Missouri had to present demonstrable evidence that its citizens in fact perceived the Missouri system of unlimited contributions as corrupt. In so

prophylactic measures which burden the First Amendment rights of particular groups and individuals. For example, in *Buckley*, the Court approved the FECA provisions setting requirements for the establishment of "political committees," which, in turn, may contribute \$5,000 to any candidate with respect to any election for federal office, stating that "the basic provision enhances the opportunity of bona fide groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." 424 U.S. at 35-36. See also *id.* at 37 (treating certain volunteer expenses as contributions "forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign"); *id.* at 38 (upholding the aggregate limitation of \$25,000 on individual contributions during any calendar year "to prevent evasion of the \$1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party"); *California Medical Ass'n v. FEC*, 453 U.S. at 198-99 (upholding limits on contributions to multi-candidate political committees as "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*").

doing, the court entirely misunderstood *Buckley* and its progeny and, in any event, ignored the record in the district court.

1. *Buckley's* premise is that "opportunities for abuse [are] *inherent* in a regime of large individual contributions" and that "public awareness" of these opportunities creates a damaging appearance of corruption that the government has a compelling need to address. 424 U.S. at 27 (emphasis supplied). See *id.* at 30 ("the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse *inherent* in the process of raising large monetary contributions be eliminated" (emphasis supplied)). Like all citizens of the United States, Missouri citizens are members of the public to whom a "regime of large individual contributions" appears corrupt, and whose confidence in representative government is consequently eroded. Indeed, human nature uniformly perceives a conflict of interest when a public servant makes decisions of interest to large donors, who in turn can dramatically affect that official's prospects for financial gain and future political success. Missouri certainly is permitted to rely upon common sense and accepted tenets of human behavior in adopting rules governing its elections.

The fundamental realities that government officers who receive money or items of value appear to be in debt to the giver, and that this appearance erodes public confidence in government, are the basis of laws that limit campaign contributions and otherwise regulate campaign finance generally. They are also embedded in federal and state conflict of interest laws. See, e.g., 5 U.S.C. § 7353(a)(1), (a)(2) (forbidding government employees to solicit or accept anything of value from persons "seeking official action from, doing business with, or . . . conducting

activities regulated by, the individual's employing entity" or "whose interests may be substantially affected by the performance or nonperformance of the individual's official duties"); 18 U.S.C. § 208 (forbidding government employees to participate in government action in which they, their spouses, or other specified persons have a financial interest); Mo. Rev. Stat. §§ 105.450-105.464 (1994 and Supp. 1998) (restricting circumstances in which public officials can do business with public bodies and prohibiting public officials from, *inter alia*, favorably acting on matters designed to provide a special monetary benefit to such official, his or her spouse, or dependent).²⁰

The Court may take judicial notice of these laws which constitute, at a minimum, substantial support for reasonable legislative findings that a system of unrestricted financial contributions to candidates for government office creates an appearance of conflict of interest, and hence corruption. Cf. *United States v. National Treasury Employees Union*, 513 U.S. at 473 ("Congress reasonably could assume that payment of honoraria to judges or high-ranking officials in the Executive Branch might generate [an] appearance of improper influence"); *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947) (upholding prohibitions of the Hatch Act because "Congress may have concluded" that partisan political activity by federal employees would undermine the efficiency and integrity of

²⁰ Cf. *United States v. National Treasury Employees Union*, 513 U.S. 454, 472 n.18 (1995) (invalidating statute banning honoraria for low-level government employees, because the government's evidence did not relate to such employees "or to any employee engaged in writing or speaking or in any conduct *unrelated to his or her Government job*" (emphasis supplied)); *id.* at 474 ("[a]bsent such a nexus [to government employment], no corrupt bargain or even appearance of impropriety appears likely"); Model Code of Judicial Conduct Canon 5 (1990) (restricting giving or acceptance of campaign contributions by judges).

public servants); *Ex Parte Curtis*, 106 U.S. 371, 373 (1882) (upholding a law forbidding federal employees to receive or give money to other federal employees for political purposes in order "to promote efficiency and integrity in the discharge of official duties").

In these areas, legislatures often make common sense findings that the public's compelling interest in preventing the appearance and reality of corruption is served by regulation of financial transactions involving current or prospective public officials. In *Buckley*, this Court expressly approved the use of such findings in support of legislative enactment of campaign contribution limits.

2. It is plainly improper to require, as the lower court did, proof that unregulated donations create the perception of corruption. *Buckley* makes clear that neither the federal government nor the State is required to wait until a regime of unlimited campaign contributions in fact has seriously damaged public confidence in our system of representative government before it can legislate to prevent this evil. Legislatures must be able to attack anticipated harms, not just past or current ills.

In an analogous context—state regulation of election ballots—this Court observed: "We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986) (citing *Jenness v. Fortson*, 403 U.S. 431 (1971), *American Party v. White*, and *Storer v. Brown*). In words directly applicable here, the Court rejected any requirement that a State must make an evidentiary showing of actual voter confusion:

To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights. 479 U.S. at 195-96.

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994), relied on by respondents below, is not to the contrary. There the Court agreed that the government had an important interest at stake, but required the government to show "that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry"—i.e., that "the recited harms are real." *Id.* at 644-65. That conclusion, however, is easily harmonized with *Buckley*, *Munro*, *National Treasury Employees Union* and like cases.

The level of "proof" the Court requires naturally varies with the nature of the proposition to be proved. Of some facts, the Court takes judicial notice. Some facts (e.g., the appearance of corruption created by a system allowing unlimited contributions or payments of honoraria to judges and high-level officials or voter confusion caused by ballot clutter) the Court finds "inherent" or so well established that little or no proof is required. Other facts, those that are neither inherent nor historically established, must be "adequately shown." But even then, a legislature's predictive judgment is still entitled to sub-

stantial deference. *Turner Broadcasting System, Inc.*, 512 U.S. at 664, 665, 669 (Blackmun, J., concurring), 670 (Stevens, J., concurring). In light of the nature of the fact at issue, the Missouri legislature could reasonably make exactly the same determination that Congress made in 1974: that a system of unlimited direct contributions to candidates necessarily creates a public perception of corruption, and that limiting the size of contributions to candidates will ameliorate that ill. Missouri's determination is entitled to deference.

3. In any event, if Missouri were required to present evidence that its citizens actually and reasonably perceived corruption in a system in which unlimited contributions to candidates for public office were lawful, Missouri carried that burden, as the district court found. The district court's common-sense conclusion is amply supported by a record at least as telling as that relied on in *Buckley*.²¹

First, the district court could and did take judicial notice of the fact that Missouri citizens had, through their elected representatives and through Proposition A, sought to enact contribution limits. Indeed, Proposition A's contribution limits, which are much lower than those enacted by the legislature, commanded 74% of the electorate, a fact that, by itself, manifests the public perception that creation of political debts in candidates for state and local office endangers the integrity of the electoral and governance processes. See *California ProLife Council Political Action Committee v. Scully*, 989 F. Supp. 1282,

²¹ Observing that "the scope of such pernicious practices [could] never be reliably ascertained," the Court in *Buckley* considered the limited number of examples of corruption cited by the court of appeals sufficient to show that the problem was not "illusory." 424 U.S. at 27 & n.28 (citing 519 F.2d at 839-40 & nn. 36-38). Given the nature of the legal standards that properly govern this case, no greater showing would be sensible.

1295 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999) (finding evidence of the appearance of corruption, *inter alia*, in "the persistence of the California electorate in seeking to enact contribution limits"). The district court also properly took notice that initiative supporters described and promoted it as an effort to "temper the influence of special interests" and to reform a "money-influenced" political system and make it a citizen-influenced system. App. 32a n.7 (internal quotations omitted).

Second, the district court had before it an affidavit from Missouri State Senator Wayne Goode, who had served for a total of 35 years in the state legislature. J.A. 46-47. That affidavit filled the "void" created by Missouri's practice of not maintaining legislative histories and thus not providing direct access to its legislators' purposes in passing laws. Senator Goode was co-chair of the committee that conducted hearings and debated and proposed the limits in Senate Bill 650 to the full legislature. He stated that the committee considered both the costs of campaigning and the point at which contributions could become unduly influential and that, balancing those interests, the committee arrived at the limits ultimately enacted. *Id.* His account confirms what is clear on the face of the law—the contribution limits were enacted to address a public perception that legislative votes or executive actions were being purchased with campaign contributions. It provides a record that is fully the equal of the record available to the Court in *Buckley*.

Senator Goode's description of the legislature's purpose was confirmed by other sources. Specifically, the district court relied on newspaper articles and editorials published immediately prior to the enactment of Senate Bill 650, providing additional evidence that the public

perceived the political process as corrupted by influence buying and that the legislature was addressing this public perception in enacting contribution limits. See note 3 and accompanying text, *supra*.²²

The district court also recognized, see *supra*, at 7, that only a few individuals are willing and able to contribute more than the amount Missouri permits. That explains why most citizens would be suspicious about the likely influence those few who can contribute more would have upon a candidate, if elected. It is simply unrealistic to expect the 99.7% of citizens who do not contribute even \$100 to believe that they have access and influence that is even remotely equivalent to that of the elite portion of the remaining .3% who can and will contribute more than \$2,000 to any individual candidate.

In light of this Court's decision in *Buckley* and the common sense nature of the inquiry—whether the public believes that recipients of large contributions are beholden to their paymasters in a way that affects, either consciously or unconsciously, the performance of their public duties—the district court's findings were not necessary, but surely were sufficient to demonstrate that Missouri has a compelling interest in preventing the appearance of corruption in the election and governance processes.

III. MISSOURI'S CONTRIBUTION LIMITS DIRECTLY, REASONABLY, AND CONSTITUTIONALLY SERVE THE STATE'S PURPOSE.

Because contribution limits such as Missouri's are not subject to strict scrutiny, the State need not demonstrate that the precise limit adopted—in this case \$1,075—is

²² In an astounding leap, the court of appeals jumped over this evidence in the district court, finding that it was not enough even to create a genuine issue of fact sufficient to preclude summary judgment for the plaintiffs.

the lowest amount that would serve the State's compelling interests. *Buckley* expressly refused to engage in "narrow tailoring" or "least restrictive alternative" analysis, and instead applied a balancing test that requires deference to a legislature's reasonable judgment concerning limits absent evidence that First Amendment rights are unduly burdened. See *supra*, Part II.B. Respondents proffered no such evidence here.

A. Under *Buckley*, Legislatures May Enact Reasonable Contribution Limits That Do Not Unduly Burden Constitutional Rights.

In *Buckley*, this Court found that a "\$1,000 contribution limitation focuse[d] precisely on the problem of large contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified." 424 U.S. at 28 (emphasis added). The Court accepted as reasonable Congress' judgment that \$1,000 is a number that carries with it potentially corrupting influence, and refused to second-guess that legislative judgment by asking "whether, say, a \$2,000 ceiling might not serve as well as \$1,000." *Id.* at 30. The Court explained that even such a 100 percent difference would not matter, for "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.*

Buckley's analysis is dispositive here, and its deferential approach is the only one that comports with common sense. The government cannot demonstrate that any given contribution limit is no larger than absolutely necessary to ameliorate a public perception of corruption. The point at which an individual candidate will be corrupted or an individual member of the Missouri public will perceive corruption varies dramatically, and thus no single contribution limit is demonstrably necessary. Cf. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal*,

Inc., 492 U.S. 257, 300 (1989) (“[W]hat is ruin to one man’s fortune, may be a matter of indifference to another’s”) (O’Connor, J., opinion) (quoting 4 W. Blackstone, Commentaries * 371). Accordingly, an exact fit requirement would effectively disable government from combating the fundamental evils associated with private political influence, “evil[s] which endanger[] the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern.” *Crandon v. United States*, 494 U.S. 152, 165 n.20 (1990) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961) (quotations omitted)).

Thus, where, as here, “it is seen that a line or point there must be, and that *there is no mathematical or logical way of fixing it precisely*, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.” *Buckley*, 424 U.S. at 83 (quoting *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928) (emphasis supplied)).²³ Absent such a demonstration, the legislature’s judgment about the necessity of a particular limit should be upheld, as *Buckley* commands. See also *Munro v. Socialist Workers Party*, 479 U.S. at 196 (where some restriction is necessary to further the State’s compelling interest, the legislature’s choice will be upheld if its “response is reasonable and does not significantly impinge on constitutionally protected rights” (emphasis supplied)); *California Medical Ass’n v. FEC*, 453 U.S. at 199 n.20 (“[b]ecause we conclude that the challenged limitation does not restrict the ability of individuals to engage in protected political advocacy, Con-

²³ The experience of a single candidate or a single PAC should almost never be sufficient to state a valid claim that a contribution limit is invalid. Limits do not seriously restrain political communication simply because they hinder the campaign of a single, marginal candidate.

gress was not required to select the least restrictive means of protecting the integrity of its legislative scheme”); *United Public Workers v. Mitchell*, 330 U.S. at 101 (upholding Hatch Act prohibitions against First Amendment claim and stating that it is not necessary that such restraints be “indispensable”).

B. Missouri’s Limits Are Reasonable And Hence Constitutional.

1. There is ample evidence that Missouri’s statewide contribution limits reflect a reasonable legislative judgment about what constitutes a “large” and potentially corrupting contribution and thus serves the State’s compelling interest in preventing the appearance of such corruption. As is detailed *supra*, at 18-19, only a minuscule percentage of Americans generally, and Missouri citizens more particularly, give more than one or two hundred dollars to an election campaign. Indeed, before limits were enacted, only about .3% of Missourians contributed more than \$100 to any one candidate, and even among those who contributed at least \$100, only a small percentage gave more than \$2,000 before limits went into effect. In addition, in 1994, 74% of all voters approved a referendum imposing a \$300 limit per election cycle on contributions to statewide offices, strongly suggesting that per election contribution limits at the substantially higher level of \$1,075 are considered “large.” In these circumstances, the Missouri legislature reasonably determined that contributions of \$1,075 per election and \$2,150 per election cycle are very “large” contributions indeed.

2. Although this Court had in 1976 upheld a contribution limit of \$1,000 in federal elections, respondents argued and one judge below concluded, that the Missouri contribution limit of \$1,075 was unduly restrictive simply

because that limit amounts to \$378 in 1976 dollars, according to the consumer price index, App. 8a & n.4, and thus "appear[ed] likely" to preclude many candidates from amassing the resources necessary for effective advocacy. *Id.* 8a. *Buckley* forbade precisely this type of analysis.

The Missouri legislature made a judgment about the contribution limits that would protect and serve its compelling interests. A court is not empowered to fine tune the number chosen or to decide whether a less restrictive number would serve the legislature's purpose equally well. Instead, a court should inquire whether, in all the circumstances, the contribution limit is "different in kind" than the contribution limit approved in *Buckley*. And differences in kind are not mere numerical differences, but rather those which operate to cripple or negate the First Amendment rights in question.²⁴ See *Burson v. Freeman*,

²⁴ In stating its "differen[ce] in kind" test, the Court cited its decisions in *Kusper v. Pontikes*, 414 U.S. 51 (1973), and *Rosario v. Rockefeller*, 410 U.S. 752 (1973), both involving state rules governing who could vote in party primaries. In *Rosario*, the Court upheld New York's requirement that a voter register with a party eight months prior to the party's presidential primary, whereas in *Kusper*, the Court invalidated an Illinois rule prohibiting anyone who voted in one party's primary in the preceding 23 months from voting in the primary of another party. But the Court did not simply rely on the comparative lengths of the delays that the enrollment rules caused to distinguish the constitutionality of the two rules. To the contrary, the Court explained that Illinois' enrollment rule was unconstitutional because it "absolutely precluded [persons subject to it] from participating in the . . . primary." *Id.* at 60 (emphasis supplied). By contrast, New York's constitutionally permissible rule "did not have the consequence of 'locking' a voter into an unwanted party affiliation from one election to the next; any such confinement was merely the result of the elector's voluntary failure to take timely measures to enroll." *Id.* It was this difference in the preclusive effects of the two requirements, not the comparative length of the delays they caused, that determined the constitutionality of the two rules.

504 U.S. at 208, 210 (upholding state law banning electioneering within 100 feet of polling place and stating that "[r]educing the boundary to 25 feet is a difference only in degree, not a less restrictive alternative in kind"). See also *Buckley*, 424 U.S. at 83 (upholding disclosure level of \$100, despite Congress' failure to "focus[] carefully on the appropriate level" because "the line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion"); *id.* at 103-04 (upholding 5% threshold for public financing of general election campaign and stating that "the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make" and "[w]e cannot say that Congress' choice falls without the permissible range").

Here, respondents did not show, and indeed, could not have shown, that Missouri's statewide contribution limit significantly affected, let alone crippled or negated, the exercise of their First Amendment rights. See *supra*, at 18-20 (detailing contribution and expenditure evidence). In the absence of such a showing, the lower court's determination that Missouri's limits were "different in kind" from those upheld in *Buckley* is a naked act of judicial second-guessing in an area where, as this Court has made clear, courts should defer to legislative judgments.²⁵

²⁵ Compounding its error, the court of appeals refused to identify what limits would serve the State's compelling interests, and instead simply asserted tautologically that once States satisfy their (undefined) burden of proof, the problem of determining where the line between constitutionally permissible and impermissible limits "can be expected largely to disappear." App. 9a. In effect, the lower court simply announced that the State had erred and sent it back to "try again," with no guidance as to how it might satisfy the standards of strict scrutiny. This course of conduct is at war with *Buckley*'s recognition that courts lack the tools necessary to assess the relative efficacy of contribution limits. 424 U.S. at 30.

In addition, pure inflation-based arguments are unduly simplistic and highly misleading. In 1973, the year before Congress enacted the federal limit of \$1,000 (and the only year during the 1970s that a Consumer Expenditure Survey was conducted), the average American household had \$2,100 in disposable income (*i.e.*, income left after taxes and payments for food, housing, utilities, transportation, pensions, insurance, clothing and health care).²⁶ Under respondents' logic, average disposable household income should have increased 225%, or \$4,725, as a result of the rate of inflation that prevailed between December 1973 and January 1995 (when the Missouri limits went into effect).²⁷ In fact, however, average disposable household income increased only 100%, or \$2,181, during this 22-year period.²⁸ And it is growth in disposable income, rather than the far more dramatic growth in inflation, that drives charitable giving: during the same 22-year period that disposable income rose 100%, average household cash contributions rose 82%, from \$508²⁹ to \$925, not the 225% that the inflation rate would suggest.³⁰

²⁶ See Bureau of Labor Statistics, *Consumer Expenditure Survey 1972-73*, Table 1.

²⁷ Dividing the January 1995 Consumer Price Index ("CPI") of 150.3 by the December 1973 CPI of 46.2, yields an inflation adjustment factor of 3.25. $\$2,100 \times 3.25 = \$6,825$, an increase of \$4,725. The monthly CPI for these years is available at <<http://stats.bls.gov/cpihome.htm>>.

²⁸ See note 10, *supra* (noting that average household disposable income in 1995 was \$4,281).

²⁹ See *Consumer Expenditure Survey 1972-73*, *supra*, Table 1.

³⁰ Inflation-based arguments also ignore the significantly different context in which Missouri's limits, as opposed to the federal limits, operate. See W.J. Connolly, *How Low Can You Go? State Contribution Limits and the First Amendment*, 76 B.U. L. Rev. 483, 532 (1996) ("a court should be sensitive to several important differences between national, state, and local elections, differences that compensate for the effects of lower contribution limits").

Finally, as the district court suggested, the impact of inflation on avenues of communication is not a simplistic calculation. The impact of technological advances on candidates' ability to communicate their messages less expensively must be factored into any assessment of the effects of inflation. See App. 39a.

It is the impact of a contribution limit on First Amendment rights, and not the impact of inflation on a contribution limit, that determines the constitutionality of the limit at issue. Missouri's limits are constitutional simply because they impose no undue burden on First Amendment rights.

* * * *

The fundamental error of the court of appeals is its cavalier treatment of *Buckley*. The lower court's decision diminishes the dignity of a constitutional holding and undermines the public interest in some measure of certainty. In *Buckley*, this Court established a constitutional framework for the analysis of campaign contributions and applied that framework to uphold a federally-enacted contribution limit of \$1,000. Both the Court's holding and its analysis govern federal and state courts' analysis of contribution limits. States and cities have relied on that holding and analysis as a safe harbor from constitutional violations in developing their legislative programs. The judgment that \$1,000 passes the constitutional test established in *Buckley* should not be invalidated by an inflating consumer price index (or, less realistically, be reinstated by deflation).

An extraordinary burden falls on those who would invalidate *Buckley*'s constitutional holding—at a minimum, a burden to show that the \$1,000 limit approved in *Buckley* cripples or negates First Amendment rights as

applied in Missouri.³¹ Respondents entirely failed to make such a showing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 12, 1999

³¹ In an analogous context, this Court has instructed that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (internal quotations and citations omitted).

APR 12 1999

No. 98-963

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF
MISSOURI, ET AL., PETITIONERS

v.

SHRINK MISSOURI GOVERNMENT PAC, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether Missouri's limit of \$1075 per election on the amount that any person may contribute to a candidate for statewide public office violates the First Amendment.

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**BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

This case presents a First Amendment challenge to a Missouri statute that currently imposes a limit of \$1075 per election (subject to adjustment for inflation) on the amount that any person may contribute to the campaign of any candidate for statewide public office. The Federal Election Campaign Act of 1971, as amended, prohibits campaign contributions in excess of \$1000 per election to candidates for federal office. 2 U.S.C. 441a(a)(1)(A). Because the resolution of respondents' constitutional challenge could affect the validity of the federal contribution limit, the United States has a substantial interest in this case.

STATEMENT

1. This case involves a First Amendment challenge to campaign contribution limits established by the Missouri legislature. In July 1994, the legislature enacted Senate Bill 650, which amended the State's campaign finance law to restrict the amounts that can be contributed to candidates for public office. See Pet. App. 2a. Senate Bill 650 imposed a limit of \$1000 per election on the amount that any person could contribute to any candidate for statewide public office. Mo. Ann. Stat. § 130.032.1(1) (West Supp. 1999); see *Carver v. Nixon*, 72 F.3d 633, 635 (8th Cir. 1995), cert. denied, 518 U.S. 1033 (1996).¹ The law further provides that the contribution limits "shall be increased on the first day of January in each even-numbered year by multiplying the base year amount by the cumulative consumer price index." Mo. Ann. Stat. § 130.032.2 (West Supp. 1999). As adjusted in 1998 for changes in the consumer price index, the statute currently imposes a limit of \$1075 per election

¹ By its terms, Senate Bill 650 was scheduled to become effective on January 1, 1995. Pet. App. 2a; *Carver*, 72 F.3d at 634. In November 1994, 74% of Missouri voters approved a ballot initiative (Proposition A) that imposed substantially more restrictive limits on campaign contributions, including a limit of \$300 per "election cycle" (i.e., for the primary and general elections combined, see Pet. App. 26a n.2) on contributions to candidates for statewide office. See *Carver*, 72 F.3d at 635; Pet. App. 26a-27a. The Missouri Attorney General took the position that the more restrictive limits imposed by Proposition A superseded the limits contained in Senate Bill 650. *Carver*, 72 F.3d at 635; Pet. App. 27a. The Eighth Circuit subsequently determined that the Proposition A limits violated the First Amendment, see *Carver*, 72 F.3d at 640-645, and the limits imposed by Senate Bill 650 then took effect. Pet. App. 3a.

on contributions to candidates for statewide office. Pet. App. 3a, 24a; J.A. 8, 37.²

The Federal Election Campaign Act of 1971 (FECA), as amended, similarly prohibits any person from making contributions "to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$1,000." 2 U.S.C. 441a(a)(1)(A). In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), this Court considered a broad range of constitutional challenges to various provisions of the FECA. The Court upheld the \$1000 limit (then codified at 18 U.S.C. 608(b)(1) (Supp. IV 1974)) on contributions to candidates for federal office. 424 U.S. at 23-35. The Court explained that "the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—[provides] a constitutionally sufficient justification for the \$1,000 contribution limitation." *Id.* at 26.

² The statewide offices subject to the \$1075 limit are the offices of governor, lieutenant governor, secretary of state, state treasurer, state auditor, and attorney general. Mo. Ann. Stat. § 130.032.1(1) (West Supp. 1999); Pet. App. 3a. The \$1075 limit also applies "to any other office, including judicial office, if the population of the electoral district, ward, or other unit * * * is at least" 250,000 persons. Mo. Ann. Stat. § 130.032.1(6) (West Supp. 1999). As adjusted for changes in the consumer price index, Senate Bill 650 currently imposes the following additional contribution limits: (1) \$525 to candidates for state senator, or for any office where the population of the electoral district is 100,000 or more but less than 250,000; and (2) \$275 to candidates for state representative, or for any office where the population of the electoral district is less than 100,000. Mo. Ann. Stat. § 130.032.1(2)-(5) (West Supp. 1999); Pet. App. 3a, 25a; J.A. 8, 37. Only the \$1075 limit for candidates for statewide public office is at issue in this Court. See note 6, *infra*.

2. The plaintiffs in this case (respondents in this Court) are Shrink Missouri Government PAC (Shrink Missouri), a political action committee organized and doing business in Missouri, and Zev David Fredman, a Missouri resident and registered voter and unsuccessful candidate for the Republican Party's nomination for state auditor in the most recent election cycle. Pet. App. 3a, 29a. The defendants (petitioners in this Court) are the Attorney General of Missouri, the Chairman of the Missouri Ethics Commission and the individual members of the Commission, and the prosecuting attorney of St. Louis County. *Id.* at 29a. Respondents filed suit in federal district court, arguing that the contribution limits imposed by Senate Bill 650 violate their First Amendment rights of free speech and association. *Id.* at 3a; J.A. 5-11 (complaint).

The district court entered summary judgment in favor of petitioners. Pet. App. 24a-41a. The court observed that "[a] State indisputably has a compelling interest in preserving the integrity of its election process," *id.* at 30a (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)), and that "[a] perception of influence peddling is 'real harm' regardless of whether such peddling is actually afoot," *id.* at 31a. It also stated that "[a]s the recipients of campaign contributions, members of the legislature are uniquely qualified to gauge whether allowing those contributions to go unchecked endangers our democratic system of government, and, if so, to prescribe an appropriate remedy therefor." *Id.* at 32a.

The district court ultimately concluded that "*Buckley* controls the issues in this case." Pet. App. 39a. It held, in particular, that "the effect of inflation since *Buckley* was decided has not created a 'difference in kind' between a \$1,000 contribution in 1976, and a \$1,075

contribution in [1998]." *Id.* at 37a. The court stated that "the median income of a Missouri household in 1994 was \$31,046, an amount that, in constant 1995 dollars, was actually less than it had been nine years earlier (\$31,073 in 1985)." *Id.* at 40a. The court explained that "despite Missouri's contribution limits, candidates for state elected office are still quite able to raise funds sufficient to run effective campaigns." *Id.* at 37a. It noted as well that in the years before enactment of Senate Bill 650, only a small percentage of Missouri campaign contributors had made contributions in excess of the limits subsequently imposed by the legislature. *Id.* at 39a. The district court concluded that a decision invalidating Missouri's contribution limits would "constitute an indirect—but still improper—overruling of" this Court's decision in *Buckley*. *Ibid.*

3. The court of appeals reversed. Pet. App. 1a-19a.³ The court acknowledged that a State's interest in preserving the integrity of its electoral system is an "indisputably compelling" one. *Id.* at 5a. It held, however, that petitioners had failed to demonstrate that contributions exceeding the limits contained in Senate Bill 650 would actually threaten that interest. *Id.* at 5a-7a. The court distinguished *Buckley* on the following ground:

In reaching its conclusions concerning the constitutionality of federal campaign contribution restrictions, the *Buckley* Court noted the perfidy that had been uncovered in federal campaign financing in 1972. See 424 U.S. at 27 n. 28. But we are unwilling to extrapolate from those examples that in Missouri

³ The court of appeals had previously granted respondents' motion to enjoin the enforcement of the contribution limits pending disposition of their appeal. Pet. App. 20a-23a.

at this time there is corruption or a perception of corruption from "large" campaign contributions, without some evidence that such problems really exist. * * * We will not infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago. The State therefore must prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions.

Id. at 6a. The court of appeals held that petitioners had failed to carry that burden, and on that basis it held the challenged contribution limits unconstitutional. *Id.* at 6a-7a.⁴

Judge Bowman further concluded that the contribution limits enacted by the Missouri legislature would be unconstitutional even if petitioners could show a compelling interest in limiting campaign contributions.

⁴ — Petitioners offered into evidence, *inter alia*, the Affidavit of Senator Wayne Goode, who was the co-chairman of the Interim Joint Committee on Campaign Finance Reform at the time that Senate Bill 650 was enacted. Pet. App. 6a-7a; see J.A. 46-47. Senator Goode stated his belief that "contributions over [the statutory] limits have the appearance of buying votes as well as the real potential to buy votes. The greater the contribution, the greater potential there is for the appearance of and the actual buying of votes. It was the consensus of the Committee, and I concurred, that the limits we set forth in the bill balanced the need to run an effective campaign with the appearance of buying votes." J.A. 47. The court of appeals dismissed Goode's affidavit as "conclusory and self-serving, given the senator's vested interest in having the courts sustain the law that emerged from his committee." Pet. App. 7a.

Pet. App. 7a-9a.⁵ Judge Bowman found "as a matter of law that the limits at issue here are so small that they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms." *Id.* at 7a-8a. He stated that:

[a]fter inflation, limits of \$1,075, \$525, and \$275 cannot compare with the \$1,000 limit approved in *Buckley* twenty-two years ago. * * * In today's dollars, the [Senate Bill 650] limits appear likely to "have a severe impact on political dialogue" by preventing many candidates for public office "from amassing the resources necessary for effective advocacy."

Id. at 8a (quoting *Buckley*, 424 U.S. at 21).

Judge John R. Gibson dissented. Pet. App. 10a-19a. The dissenting judge found "no difference in kind" between Missouri's \$1075 contribution limit for statewide races and the \$1000 limit upheld by this Court in *Buckley*. *Id.* at 11a. Judge Gibson observed that "[i]f *Buckley*'s holding must wax and wane with inflation, * * * then the very statute that *Buckley* upheld would now be unconstitutional." *Id.* at 13a. He noted as well that "the campaign expenditures in Missouri's statewide elections have risen markedly since Senate Bill 650's enactment, and there is no basis for rejecting the district court's conclusion that candidates for office remain able to amass impressive campaign war chests."

⁵ Neither of the other two members of the panel joined in that part of Judge Bowman's opinion. Judge Ross filed a concurring opinion stating that he agreed with Part III A of the majority opinion, which held that petitioners had failed to satisfy their evidentiary burden, but that he did not join in Part III B. See Pet. App. 9a-10a (Ross, J., concurring). Judge John R. Gibson dissented. *Id.* at 10a-19a.

Ibid. (internal quotation marks omitted). Judge Gibson also concluded that the evidence introduced by petitioners was fully sufficient to support the particular contribution limits contained in Senate Bill 650. *Id.* at 14a-18a. He stated that those limitations “became law only after careful and informed deliberation by the legislature,” and that “[t]he Court should not so lightly cast aside the legislature’s findings in favor of its own.” *Id.* at 16a.⁶

SUMMARY OF ARGUMENT

A. This case is controlled by the Court’s analysis of campaign contribution limits in *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court in *Buckley* sustained a \$1000 contribution limit applicable to elections for federal office. The Court explained that the contribution limit left open ample alternative means by which would-be donors could engage in political speech and association. It held that the public and governmental interest in preventing the fact and appearance of electoral corruption provided a constitutionally sufficient justification for the \$1000 cap. While recognizing the possibility that contribution limits might under some circumstances prevent candidates from acquiring sufficient resources to engage in effective political speech, the Court found no reason to believe that the \$1000 limit contained in the federal law would have that effect. The *Buckley* Court’s holding and analysis of contribution limits apply

⁶ Although the full range of the Senate Bill 650 contribution limits was at issue in the courts below, the question presented in the petition for a writ of certiorari is limited to “Missouri’s campaign contribution limits for statewide office, which exceed the limits expressly approved by this Court for national elections in” *Buckley*. Pet i. Thus, only the \$1075 limit applicable to candidates for statewide public office is at issue in this Court.

with full force to Missouri’s \$1075 limit on contributions to candidates for statewide public office.

The court of appeals sought to distinguish *Buckley* on the ground that the Missouri legislature—unlike the Congress that enacted the federal limit—had failed to document the existence of actual problems caused by large campaign contributions. The court of appeals substantially understated the strength of the evidence suggesting a link between large contributions to Missouri candidates and real or apparent political corruption. Its more fundamental error, however, was in reading *Buckley* to require empirical proof of the nexus between large campaign contributions and political corruption. Although the *Buckley* Court noted in passing that abuses had occurred during the 1972 campaign, its primary focus was on the reasonableness of Congress’s view that large contributions to political candidates are *inherently* likely to cause actual or apparent corruption of the electoral process.

One judge on the court of appeals concluded that, as a result of increases in the cost of living during the years between 1976 and 1998, Missouri’s \$1075 contribution limit is different in kind from the \$1000 limit approved by this Court in *Buckley*. As *Buckley* makes clear, however, a reviewing court owes substantial deference to legislative judgments regarding the point at which a contribution limit should be set. The available evidence provides no support for the proposition that Missouri’s \$1075 contribution limit differs in kind from the limit previously approved by this Court. To the contrary, the evidence indicates that only a small percentage of Missouri contributors are affected by that limit, and that campaign expenditures in the State have increased significantly since the contribution limit was enacted.

B. The only basis on which to sustain the court of appeals' ruling would be to overrule *Buckley's* analysis of contribution limits. No intervening development of fact or law supports such a departure from principles of stare decisis with respect to that issue.

Neither respondents nor the court of appeals has identified any colorable basis for concluding that large campaign contributions have ceased to pose a significant risk of real or apparent electoral corruption. Congress has retained the \$1000 limit on contributions to federal candidates, and the vast majority of States have imposed similar restrictions. That legislative activity belies any suggestion that the *Buckley* rule concerning campaign contributions has become archaic or outmoded.

The *Buckley* Court's treatment of contribution limits is fully consistent with the subsequent development of the Court's First Amendment jurisprudence. This Court has repeatedly cited that aspect of *Buckley* with apparent approval, and it has accepted the propriety of reasonable contribution limits as the starting point for constitutional analysis of other forms of campaign-finance regulation. The Court has recognized more generally that the right to associate for political purposes is not absolute, and that incidental impairments of that right may often be justified by the State's interest in preserving the integrity and efficiency of its electoral processes. Finally, the Court has made clear that the Constitution permits the government to regulate the manner in which candidates for public office conduct their electoral campaigns. Thus, while Missouri's \$1075 contribution limit undoubtedly entails some restriction on the contributor's expressive and associational activities, and on the candidate's ability to amass the full amount of funds that he might otherwise

acquire, this Court's decisions make clear that the limit is not thereby rendered unconstitutional.

ARGUMENT

THE MISSOURI LAW AT ISSUE IN THIS CASE, WHICH PROVIDES THAT NO PERSON MAY CONTRIBUTE MORE THAN \$1075 PER ELECTION TO ANY CANDIDATE FOR STATEWIDE PUBLIC OFFICE, IS CONSISTENT WITH THE FIRST AMENDMENT.

A. The Court Of Appeals' Decision Conflicts With *Buckley v. Valeo*, In Which This Court Rejected A First Amendment Challenge To A \$1000 Limit On Contributions To Candidates For Federal Office

1. This case is controlled by the Court's analysis of campaign contribution limits in *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* involved a challenge to various provisions of the Federal Election Campaign Act of 1971 (FECA), as amended. One of those provisions established as a general rule that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$1,000." 18 U.S.C. 608(b)(1) (Supp. IV 1974) (quoted in *Buckley*, 424 U.S. at 189).⁷ The Court in *Buckley* upheld the \$1000 ceiling on contributions to candidates, explaining that the public and governmental interest in preventing actual or apparent corruption of the electoral process justified the relatively minor burden on

⁷ The current version of former Section 608(b)(1) states:

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$1,000

2 U.S.C. 441a(a)(1).

expressive and associational activities that the contribution limit entails. 424 U.S. at 26-29.

After considering the practical effect of the \$1000 contribution limit, and the alternative means of political expression that remained available, the Court determined that the contribution limits effected "only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20-21. The Court explained:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. at 21 (footnote omitted).

The Court recognized that "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21. It found "no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations," noting that "approximately 5.1% of the \$73,483,613 raised by the 1,161 candidates for Congress in 1974 was obtained in amounts in excess of \$1,000." *Id.* at 21 & n.23. The Court stated that "[t]he overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Id.* at 21-22 (footnote omitted).

The Court recognized that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association." 424 U.S. at 24-25. It stated that "governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25 (internal quotation marks omitted). The Court observed, however, that "[n]either the right to associate nor the right to participate in political activities is absolute," and that "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and

employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Ibid.* (internal quotation marks omitted).

The Court held that "the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions —[provides] a constitutionally sufficient justification for the \$1,000 contribution limitation." 424 U.S. at 26. The Court explained:

To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. * * * Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Id. at 26-27 (footnote, ellipsis, and internal quotation marks omitted).

The Court concluded that "[t]he Act's \$1,000 contribution limitation focuses precisely on the problem of large campaign contributions * * * while leaving persons free to engage in independent political express-

ion, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." 424 U.S. at 28. It rejected an argument that the \$1000 contribution limit was set "unrealistically low," explaining that "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000." *Id.* at 30 (internal quotation marks omitted). The Court noted that "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Ibid.*

2. Despite the *Buckley* Court's approval of FECA's \$1000 limit on federal campaign contributions, the court of appeals in the instant case invalidated Missouri's \$1075 limit on contributions to candidates for statewide office. The court of appeals held that *Buckley* was not controlling because petitioners had failed to prove the existence of Missouri-specific problems resulting from large campaign contributions. Judge Bowman concluded in addition that the effects of inflation had rendered Missouri's \$1075 contribution limit "different in kind" from the \$1000 limit upheld in *Buckley*. Neither of those theories withstands scrutiny.

a. The court of appeals stated that "[i]n reaching its conclusions concerning the constitutionality of federal campaign contribution restrictions, the *Buckley* Court noted the perfidy that had been uncovered in federal campaign financing in 1972." Pet. App. 6a (citing *Buckley*, 424 U.S. at 27 n.28). The court was "unwilling to extrapolate from those examples that in Missouri at this time there is corruption or a perception of corruption from 'large' campaign contributions, without some evidence that such problems really exist." *Ibid.*

The court of appeals therefore required petitioners to “prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions,” *ibid.*, and it concluded (*id.* at 6a-7a) that petitioners had failed to carry that evidentiary burden. That analysis is flawed in two distinct respects.

To begin with, the court of appeals substantially understated the strength of the evidence suggesting a link between large contributions to Missouri candidates and real or apparent political corruption. As the district court recognized, large contributions to candidates for at least two statewide offices in Missouri were publicly reported near the time of Senate Bill 650’s enactment, leading to concern about possible corruption. Pet. App. 31a n.6; see also *Carver v. Nixon*, 72 F.3d 633, 642 (8th Cir. 1995), cert. denied, 518 U.S. 1033 (1996). Shortly before the Senate Bill 650 limitations were to take effect, voters in Missouri overwhelmingly approved a ballot initiative that would have imposed substantially lower contribution limits, suggesting a significant perception of corruption within the electorate. Pet. App. 32a n.7. In addition, state Senator Wayne Goode, who co-chaired the Interim Joint Committee on Campaign Finance Reform at the time that Senate Bill 650 was enacted, signed a sworn affidavit expressing his belief that contributions in excess of the statutory limits “have the appearance of buying votes as well as the real potential to buy votes.” J.A. 47; Pet. App. 31a.⁸

⁸ The court of appeals characterized the affidavit as “self-serving, given the senator’s vested interest in having the courts sustain the law that emerged from his committee.” Pet. App. 7a. As Judge Gibson explained, however, the court of appeals im-

The more fundamental flaw in the court of appeals’ approach, however, lies in its mistaken view that *Buckley* required empirical proof of the nexus between large campaign contributions and corruption of the political process. The *Buckley* Court’s passing reference (424 U.S. at 27) to “the deeply disturbing examples [of corrupt practices] surfacing after the 1972 election” was scarcely central to the Court’s constitutional analysis. The Court in *Buckley* focused not on isolated examples of proven misconduct, but on the manifest reasonableness of Congress’s determination that large campaign contributions are *inherently* likely to cause widespread actual or apparent corruption of the electoral process.⁹

Thus, the *Buckley* Court explained that the appearance of corruption “stem[s] from public awareness

properly “rule[d] upon the credibility of a witness on a summary judgment motion” and “gratuitously impugn[ed] the senator’s description of the evidence before the Committee, the conclusions drawn by the Committee, and his fellow legislators’ first-hand knowledge of what it costs to wage a campaign and the dangers presented by contributions above the limits enacted.” *Id.* at 15a n.6 (John R. Gibson, J., dissenting).

⁹ The State’s interest in preventing electoral corruption encompasses all situations in which large campaign contributions could influence (or might plausibly be suspected of influencing) official actions taken by the recipients. The State need not limit its efforts to the sort of specific *quid pro quo* arrangements that violate bribery laws or similar criminal prohibitions. Compare *McCormick v. United States*, 500 U.S. 257, 273 (1991) (campaign contributions violate the Hobbs Anti-Racketeering Act, 18 U.S.C. 1951 *et seq.*, “only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act”) with *Buckley*, 424 U.S. at 27-28 (“laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action”).

of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27. It found that "Congress was surely entitled to conclude * * * that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28. See also *id.* at 30 ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."). The court of appeals therefore erred in requiring petitioners to make a formal evidentiary record establishing, on a Missouri-specific basis, that campaign contributions in excess of the statutory limits would likely result in actual or apparent electoral corruption.

b. Judge Bowman also concluded that petitioners could not prevail in this case even if they had established a danger of real or apparent corruption because "the [contribution] limits at issue here are so small that they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms." Pet. App. 8a. He explained that "[a]fter inflation, limits of \$1,075, \$525, and \$275 cannot compare with the \$1,000 limit approved in *Buckley* twenty-two years ago." *Ibid.* (footnote omitted). That analysis (which would logically imply that the \$1000 federal contribution limit upheld in *Buckley* has since become invalid) is fundamentally flawed.

The Court in *Buckley* showed substantial deference not only to Congress's determination that unlimited campaign contributions threaten democratic values, but also to Congress's judgment regarding the choice of an appropriate dollar limit. The Court explained that:

[w]hile the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns, Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000."

424 U.S. at 30 (footnote omitted). That passage makes clear that the Constitution specifies no precise mathematical formula for calculating permissible contribution limits. Congress has significant latitude to determine the appropriate line of demarcation between lawful and unlawful contributions, and it may seek to enhance consistency and ease of administration by adopting a single limit applicable to all federal elections.¹⁰

¹⁰ The prospect of inflation was hardly unforeseeable at the time that *Buckley* was decided, but the Court did not suggest that Congress's failure to include a cost-of-living adjustment cast doubt on the continuing legitimacy of the FECA contribution limit. The Court specifically held that Congress could permissibly enact a single limit applicable to all federal offices, even though the costs of campaigning for congressional and Presidential elections vary substantially. See 424 U.S. at 30 & n.32. Indeed, because the cost of living varies significantly from one part of this country to another, a constitutional requirement that contribution limits must bear some precise mathematical relation to the consumer price index would preclude the enactment of *any* uniform federal limit, even with respect to a given elective office.

Although the purchasing power of \$1000 has declined considerably since *Buckley* was decided, the expressive significance of a \$1000 campaign contribution remains essentially the same. As the *Buckley* Court recognized, "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his

The *Buckley* Court indicated that "distinctions in degree" between various contribution limits might take on constitutional significance "when they can be said to amount to differences in kind." 424 U.S. at 30. There is no basis, however, for Judge Bowman's conclusion (Pet. App. 9a) that Missouri's \$1075 limit on contributions to candidates for statewide office is different in kind from the \$1000 limit approved in *Buckley*. Data for the 1994 election for state auditor and the 1992 election for secretary of state indicate that less than 3% of contributions exceeded an aggregate of \$2000 for the election cycle. See *id.* at 39a; compare *Buckley*, 424 U.S. at 21 n.23 (noting that approximately 5.1% of contributions to candidates for Congress in 1974 exceeded \$1,000). Nor have respondents attempted to prove that the limits contained in Senate Bill 650 have "prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21. To the contrary, "campaign expenditures in Missouri's statewide elections have risen markedly since Senate Bill 650's enactment." Pet. App. 13a (John R. Gibson, J., dissenting). Thus, as the district court concluded, "[d]espite Missouri's contribution limits, candidates for political office in the state are still able to amass impressive campaign war chests." *Id.* at 37a; see J.A. 24-30.

contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." 424 U.S. at 21. Even assuming that the amount of a contribution serves to some degree to express the depth of the contributor's support, a contribution at the maximum level permitted by law should ordinarily communicate the desired message.

B. The *Buckley* Court's Treatment Of Campaign Contribution Limits Is Fully Consistent With Subsequent Developments In First Amendment Jurisprudence And Should Not Be Overruled

For the reasons set forth above, there is no principled distinction between the \$1075 contribution limit at issue in this case and the \$1000 FECA contribution limit upheld by this Court in *Buckley*. So long as *Buckley*'s analysis of the constitutionality of campaign contribution limits remains good law, the decision of the court of appeals should therefore be reversed. Although "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation," *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989), "even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *United States v. International Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (citations and internal quotation marks omitted).

The "special justification[s]" that support overruling of this Court's precedents are perhaps insusceptible of precise definition, but they will generally fall into one of two basic categories. First, overruling of an existing precedent may be justified where the prior decision rests on a view of the relevant facts that appears not to reflect current reality. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (Court should inquire "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"). Second, overruling may be justified if developments in related areas of the law have rendered the earlier decision a constitutional anomaly. See, e.g., *ibid.* (Court in deciding whether to overrule precedent considers "whether related prin-

ciples of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"); *Agostini v. Felton*, 521 U.S. 203, 235-236 (1997). Neither of those "special justification[s]" applies to *Buckley's* analysis of campaign contribution limits.¹¹

1. The *Buckley* Court upheld as reasonable Congress's determination that bribery and public disclosure laws were not a sufficient response to the threat of electoral corruption, and "that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." 424 U.S. at 28; see also *id.* at 30 ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated"). Neither respondents nor the court of appeals has identified any colorable basis for concluding that large campaign contributions have ceased to pose a significant risk of real

¹¹ Currently pending before the Court is the petition for a writ of certiorari in No. 98-978, *Bray v. Shrink Missouri Government PAC, et al.*, which seeks review of the same court of appeals decision that is at issue here. Petitioners in *Bray* suggest, without significant elaboration, that this case may furnish an appropriate occasion for reexamination of other aspects of *Buckley*. See 98-978 Pet. 5. We believe that such a course of action would be unnecessary. In our view, the instant case may and should be resolved on the grounds that (a) no principled distinction exists between Missouri's \$1075 limit on contributions to candidates for statewide office and the \$1000 limit upheld in *Buckley*, and (b) no intervening development of law or fact suggests that *Buckley's* analysis of campaign contribution limits should be overruled. Whether other aspects of *Buckley* warrant reexamination by this Court should await a case that involves other forms of campaign-finance regulation.

or apparent electoral corruption. Congress has retained the \$1000 limit on contributions to federal candidates, and the vast majority of States have imposed similar restrictions. See Pet. App. 42a-44a. That pattern of legislative activity belies any suggestion that the factual underpinnings of the *Buckley* rule have become outmoded.

2. Intervening decisions of this Court during the past quarter-century have not rendered *Buckley's* First Amendment analysis of campaign contribution limits a constitutional anomaly. To the contrary, the *Buckley* Court's treatment of contribution limits is fully consistent with the subsequent development of this Court's First Amendment jurisprudence.

a. The *Buckley* Court held that FECA's \$1000 contribution limit does not abridge the contributor's right to freedom of speech. The Court explained that contribution limits impose "only a marginal restriction upon the contributor's ability to engage in free communication," since "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." 424 U.S. at 20-21. It also concluded that the public interest in reducing "the actuality and appearance of corruption" furnished "a constitutionally sufficient justification for the \$1,000 contribution limitation." *Id.* at 26.

The Court in *Buckley* stated that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association." 424 U.S. at 24-25. It explained, however, that "neither the right to associate nor the right to participate in political activities is absolute," and that "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a

sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25 (brackets and internal quotation marks omitted). Because the FECA contribution limit was supported by the governmental interest in reducing actual or apparent electoral corruption, see *id.* at 26, and because a variety of avenues of political association remained available, see *id.* at 28-29, the Court found no unconstitutional interference with associational freedoms.

Nothing in this Court's subsequent campaign-finance decisions casts doubt on the holding in *Buckley* that reasonable contribution limits do not violate contributors' First Amendment rights. To the contrary, this Court has repeatedly referred, with apparent approval, to that aspect of the *Buckley* Court's analysis. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 615 (1996) (opinion of Breyer, J.); *id.* at 628 (opinion of Kennedy, J.); cf. *id.* at 649 (Stevens, J., dissenting); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986); *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 196-197 & n.16 (1981) (plurality opinion). In some cases the Court has relied on *Buckley* in upholding legislative or regulatory measures designed to address the fact or appearance of electoral corruption. See *National Right to Work Comm.*, 459 U.S. at 208; *California Med. Ass'n*, 453 U.S. at 196-197 & n.16; *id.* at 202-203 (Blackman, J., concurring in part and concurring in the judgment). In other decisions the Court has invalidated campaign-finance restrictions only after concluding that the measures in question trenched more deeply on First

Amendment freedoms, and/or were supported by less compelling governmental interests, than the contribution limits upheld in *Buckley*. See *Colorado Republican*, 518 U.S. at 614-616 (opinion of Breyer, J.); *id.* at 628-629 (opinion of Kennedy, J.); *Massachusetts Citizens for Life*, 479 U.S. at 259-260. Thus, subsequent decisions of this Court, rather than rendering *Buckley*'s treatment of contribution limits a constitutional outlier, have accepted the validity of contribution caps as the starting point for analysis of other forms of campaign-finance regulation.¹²

¹² Indeed, it might well be argued that the *Buckley* Court applied an unduly stringent standard of review to the claim that FECA's contribution limits violate a contributor's right to freedom of speech. The Court had previously held that government regulation of expressive conduct "is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Court has since reaffirmed that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406 (1989); see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-567 (1991) (plurality opinion); *id.* at 582 (Souter, J., concurring in the judgment); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 298-299 & n.8 (1984). Direct contributions of money to political candidates might be regarded as a form of expressive conduct subject (under *O'Brien* analysis) to significant regulation, so long as the regulation serves to advance governmental interests unrelated to suppression of the contributor's "message."

In rejecting the application of *O'Brien* analysis to FECA's contribution and expenditure limits, the *Buckley* Court relied in part on *Bigelow v. Virginia*, 421 U.S. 809, 820 (1975), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). See 424 U.S.

b. *Buckley's* treatment of contribution limits is consistent not only with subsequent campaign-finance decisions, but with the legal standards that apply more generally to state regulation of the electoral process. This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); accord, e.g., *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 544, 548-549 (1987). The Court has also recognized, however, that "[t]he right to associate for expressive purposes is not * * * absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623 (citing, *inter alia*, *Buckley*, 424 U.S. at 25). The Court has specifically applied that principle to associational activities undertaken in connection with the electoral process. "When deciding whether a state election law violates First and Fourteenth Amendment associational rights, [the Court] weigh[s] the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider[s] the extent to which the State's concerns make the burden necessary."

at 16-17. Those cases are not wholly apposite: they hold that written expression does not receive reduced First Amendment protection simply because its dissemination requires a payment of money, see *Sullivan*, 376 U.S. at 266; *Bigelow*, 421 U.S. at 820, but they do not hold that the payment is itself a form of pure speech entitled to the highest level of First Amendment protection.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (internal quotation marks omitted).

As the Court recognized in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), every provision of a State's election law "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Id.* at 788. "Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest * * * would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Thus, while "[r]egulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest," "[l]esser burdens * * * trigger less exacting review." *Timmons*, 520 U.S. at 358; accord *Burdick*, 504 U.S. at 434. The Court has also emphasized the need for judicial deference to reasonable legislative judgments regarding the steps needed to safeguard the integrity of the electoral process, particularly when those judgments are by their nature insusceptible of definitive empirical proof or refutation. See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-196 (1986); *National Right to Work Comm.*, 459 U.S. at 209-210.

Thus, subsequent decisions have reinforced the *Buckley* Court's holding that reasonable contribution limits do not violate the contributor's right to freedom of association. In particular, the Court has unequivocally rejected the proposition that every legislative restriction on associational activities—no matter how slight or attenuated the resulting burden—is to be treated as presumptively unconstitutional. Where (as here) the burden on associational freedoms is relatively

small, the countervailing public and governmental interests substantial, and the State's method of achieving its objectives reasonable, nothing in this Court's decisions subsequent to *Buckley* casts doubt on the propriety of the State's action.¹³

c. The *Buckley* Court's analysis of the interests of the recipients of campaign contributions is also consistent with subsequent developments in First Amendment doctrine. The Court in *Buckley* acknowledged that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21. The Court found "no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations." *Ibid.* In upholding the FECA contribution limit on that basis, the

¹³ Indeed, under both federal and Missouri law, payments to public officials are forbidden in a variety of circumstances. See, e.g., 5 U.S.C. 7353 (generally prohibiting Members of Congress and federal officers and employees from soliciting or accepting anything of value from persons in specified circumstances); 18 U.S.C. 201(c)(1)(A) and (B) (1994 & Supp. III 1997) (no person may give, and no federal official may receive, anything of value "for or because of any official act"); 18 U.S.C. 209(a) (1994 & Supp. III 1997) (prohibiting payment or receipt of "any contribution to or supplementation of salary" of any federal Executive Branch officer); Mo. Ann. Stat. § 105.456 (West Supp. 1999) (prohibiting members of Missouri general assembly and statewide elected officials in Missouri from, *inter alia*, accepting outside compensation for acting in official capacity). Although such prohibitions limit to some degree the means by which persons outside the government may associate with favored politicians or causes, it could not seriously be contended that the prohibitions are for that reason unconstitutional.

Court necessarily rejected any suggestion that a candidate's First Amendment right to engage in political speech encompasses an absolute right to accept any and every campaign contribution offered by a willing donor.

That holding is fully consistent with intervening developments in First Amendment jurisprudence. In *National Right to Work Committee*, for example, a unanimous Court rejected a First Amendment challenge to solicitation restrictions designed to effectuate a statutory ban on corporate and union contributions to candidates for federal office. See 459 U.S. at 206-211. The Court's analysis plainly presumed that the underlying ban on corporate and union contributions is valid, notwithstanding its foreseeable impact on the quantity of funds that candidates can acquire and thereafter utilize for political expression.¹⁴ In other contexts as well, the Court has made clear that the Constitution permits the government to regulate the manner in which candidates for public office conduct their electoral campaigns. See, e.g., *Timmons*, 520 U.S. at 358, 364-370 (upholding state antifusion law prohibiting candidates from appearing on ballot as candidate of more than one political party); *Clements v. Fashing*, 457 U.S. 957, 971-972 (1982) (rejecting challenge to "resign-to-run" provision that treated an elected state official's declaration of candidacy for another elected office as an automatic resignation from the office then held).

¹⁴ Federal law has long forbidden business corporations and labor unions from making contributions to candidates for federal office. See 2 U.S.C. 441b; 11 C.F.R. 114.2(a) and (b); *Massachusetts Citizens for Life*, 479 U.S. at 246; *United States v. International United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 570-587 (1957).

Unless a particular contribution limit can be expected to "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21, it is not rendered invalid simply because it has *some* discernible impact on the amount of funds a candidate is able to acquire.

In the instant case, the district court considered the available evidence and concluded that "despite Missouri's contribution limits, candidates for state elected office are still quite able to raise funds sufficient to run effective campaigns." Pet. App. 37a. Respondents have made no effort to rebut that finding. *Buckley* therefore makes clear, and subsequent decisions of this Court confirm, that respondents cannot demonstrate a First Amendment violation based on the effect of the challenged contribution limits on the recipients' ability to engage in political speech.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,

Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN and JOAN BRAY,

Respondents.

*On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit*

**BRIEF FOR RESPONDENT JOAN BRAY
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether the court of appeals erred in declaring that Missouri's \$1,075 campaign contribution limit for statewide office, which exceeds the \$1,000 limit for national elections expressly approved by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), violates the First Amendment.

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Respondent Joan Bray, a Missouri State Representative who participated as an intervenor-appellee in this case in the Court of Appeals for the Eighth Circuit, respectfully submits this brief in support of petitioners.¹

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, filed November 30, 1998, reversing the decision of the district court and enjoining Missouri's contribution limits, is reported at *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998). The Court of Appeals' order, dated July 23, 1998, entering an injunction pending appeal, is reported at 151 F.3d 763 (8th Cir. 1998). The opinion of the district court, dated May 12, 1998, granting summary judgment to the state defendants, is reported at 5 F. Supp. 2d 734 (E.D. Mo. 1998).²

STATEMENT OF JURISDICTION

The Eighth Circuit entered its judgment on November 30, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

1. Representative Bray is denominated a respondent in this case pursuant to Rule 12.6 of the Supreme Court Rules.

2. The opinions were reproduced in the Appendix to the Petition for Certiorari at pages 1a-41a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Missouri Revised Statutes § 130.32 (1994 & Supp. 1997)

Section 130.32 provides in pertinent part:

1. [T]he amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed the following:

(1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, one thousand dollars;

* * *

2. For purposes of this subsection "base year amount" shall be the contribution limits prescribed in this section on January 1, 1995. Such limits shall be increased on the first day of January in each even-numbered year by multiplying the base year amount by the cumulative consumer price index, as defined in section 104.010, and rounded to the nearest twenty-five-dollar amount, for all years since January 1, 1995. [The \$1,000 base year amount increased to \$1,075 in 1998.]

3. Candidate committees, exploratory committees, campaign committees and continuing committees, other than those continuing committees which are political party committees, shall be subject to the limits prescribed in subsection 1 of this section. The provisions of this subsection shall not limit the amount of contributions which may be accumulated by a candidate committee and used for expenditures to further the nomination or election of the candidate who controls such committee, except as provided in section 130.052.

* * *

7. Any committee which accepts or gives contributions other than those allowed shall be subject to a surcharge of one thousand dollars plus an amount equal to the contribution per nonallowable contribution, to be paid to the ethics commission and which shall be transferred to the director of revenue, upon notification of such nonallowable contribution by the ethics commission, and after the candidate has ten business days after receipt of notice to return the contribution to the contributor. The candidate and the candidate committee treasurer or deputy treasurer owing a surcharge shall be personally liable for the payment of the surcharge or may pay such surcharge only from campaign funds existing on the date of receipt of such notice. Such surcharge shall constitute a debt to the state enforceable under, but not limited to, the provisions of chapter 143, RS Mo.

STATEMENT OF THE CASE

The Eighth Circuit's ruling in this case is the only decision in the history of campaign finance jurisprudence to invalidate a campaign contribution limit higher than the \$1,000 federal limit upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), and in effect to this day. As the dissenting judge on the sharply divided panel suggested, the appellate decision represents a *sub silentio* refusal to be bound by established Supreme Court precedent. See *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 528 (8th Cir. 1998) (Gibson, J., dissenting) ("Perhaps members of the Court quarrel not only with the contribution limits at issue today, but with *Buckley* itself, as was made evident during oral argument."). This unspoken but unmistakable repudiation of *Buckley* threatens not only contribution limits in states and localities throughout this country but also the constitutionality of the current federal ceiling.

In striking down Missouri's contribution limits, the court of appeals mechanically applied the highest level of constitutional scrutiny, without regard to uncontested evidence of the law's very limited First Amendment impact. The Eighth Circuit also unilaterally elevated the evidentiary requirements for establishing interests in combating the reality and appearance of corruption to a threshold far above that established in *Buckley*. Because facts of this case relevant to both the standard of review and the evidentiary burden closely track those underlying *Buckley*, and the fundamental principles governing the regulation of contributions to candidates established in that case rest on sound reasoning, the Eighth Circuit's decision should be reversed.

A. Statement of Facts

Like the federal government prior to the 1974 amendments to the Federal Election Campaign Act ("FECA"), Missouri imposed no limit on contributions to candidates, until the state legislature enacted Senate Bill 650 ("S.B. 650") in 1994. In the absence of contribution limits, candidates for public office in Missouri received very large contributions, just as federal candidates did before FECA's amendment. Compare *Carver v. Nixon*, 72 F.3d 633, 642 (8th Cir. 1995) (citing \$420,000 in contributions from one political action committee ("PAC") to races in northern Missouri), and *Shrink*, 5 F. Supp. 2d at 738 n.6 (citing press reports and editorials about single contributions in the range of \$20,000-\$40,000), with *Buckley*, 424 U.S. at 27 n.28 (citing appellate court discussion of contributions as high as \$2,000,000 in the 1972 elections). In both instances — state and federal — the large contributions were publicly associated with at least apparent, and possibly real, exchanges of money for political favors. Compare *Shrink*, 5 F. Supp. 2d at 738 n.6 (citing editorial about state treasurer's apparent favoritism in awarding most of Missouri's banking business to a bank that had contributed approximately \$20,000 to the treasurer's campaign), with *Buckley*, 424 U.S. at 27 n.28 (citing appellate court discussion of \$1.8 million in contributions ascribable, in whole or in part, to 31 persons given ambassadorial appointments).

In Missouri, outrage at the actual or perceived corruption of government officials in the early 1990s generated popular pressure for contribution limits. While the legislature convened an Interim Joint Committee on Campaign Finance Reform (the "Interim Committee") to consider the terms of potential legislation, citizens organized to draft a ballot initiative. In May 1994, the legislature passed S.B. 650, with a \$1,000 per election limit on contributions to candidates for state-wide

office and lower limits for candidates running in smaller, less expensive jurisdictions. *See* Mo. Stat. Ann. §§ 130.032.1, 130.032.3. The law also included a biannual adjustment of the ceilings, to account for the effect of inflation. *See id.* § 130.032.2. In November of that year, 74% of the Missouri voting population decided that the legislative limits were still too high “to remedy the corruption caused by large campaign contributions” and passed Proposition A, imposing even lower limits. *See Carver* 72 F.3d at 634, 640, 642. In *Carver*, the Eighth Circuit struck down Proposition A’s more stringent limits, *see id.* at 645, leaving those of S.B. 650 in place. (Joint Appendix (“JA”) 7-8.)

The limits imposed by S.B. 650 reflected the considered judgment of both houses of the legislature and the Governor as to when a campaign contribution became so large that, in the context of Missouri life, it would pose a risk of real or perceived corruption. As explained in the affidavit of Senator Wayne Goode, co-chair of the legislature’s Interim Committee, the committee selected the limits after hearing testimony and considering a “broad spectrum of opinions on the issue of campaign contribution limits.” (JA 46.) Senator Goode — a legislator with 22 years of experience in the Missouri House of Representatives and 14 years in the Missouri Senate — also stated under oath that the members of the committee discussed “not only what it cost to run a campaign and deliver a message to the populace, but also at what point there is the potential for contributions to become unduly influential.” (JA 46.) Based on their own long personal experience waging House and Senate campaigns in Missouri, and their intimate familiarity with the real and perceived political pressures exerted by large donors on officeholders, the committee members reached a consensus that initial \$1,000, \$500, and \$250 per election limits (for jurisdictions of decreasing size) balanced the need to raise funds for vigorous and effective campaigns with the need to

avoid the appearance that large contributors purchasing undue political influence. (JA 47.) In enacting S.B. 650, the legislature and Governor ratified the Interim Committee’s judgment about the appropriate size of the limits.

Experience under S.B. 650 shows that Missouri candidates have in fact been able to run robust campaigns under the state’s contribution limits. Indeed, several statewide candidates have raised even more money *under the limits* than candidates for the same offices had raised before the limits were enacted. (JA 24-28.) That fundraising success should come as no surprise, of course, given the 20-year public record of skyrocketing sums raised by members of Congress — including those representing Missouri — under the very same \$1,000 limits. (JA 29-30.)

B. Proceedings Below

Plaintiffs in this case are Shrink Missouri Government PAC (“SMGPAC”) and Zev David Fredman (JA 6). SMGPAC is a political action committee, which was formed after enactment of S.B. 650 and has since filed three lawsuits challenging Missouri’s campaign financing laws. Fredman was a candidate in the 1998 Republican primary for the office of Missouri state auditor. (JA 9.)

Plaintiffs filed their complaint on March 2, 1998, challenging the constitutionality of Missouri’s \$1,075, \$525, and \$275 contribution limits. (JA 1, 5-11.) Pursuant to the district court’s extremely expedited pre-trial scheduling order, the parties cross-moved for summary judgment barely one month later. (JA 1.) On May 12, finding no disputed issues of fact, the court entered summary judgment for the state. *Shrink*, 5 F. Supp. 2d at 737, 742.

In its decision, the district court did not examine the impact of the contribution limits on the First Amendment interests of either plaintiff. Had the court done so, it would have found that the contribution limits played at most a minor role in plaintiffs' failure to raise funds or to spend them on timely campaign speech.³ Fredman raised funds from *no one* but SMGPAC for an entire year after forming his candidate committee. See Exhibit 1 to Affidavit of Zev David Fredman, sworn to on Aug. 5, 1998 (the "List of Contributions").⁴ Moreover, even after the Eighth Circuit enjoined Missouri's contribution caps, and Fredman made his "best possible efforts to raise large contributions," not even one contributor (except the PAC) would give him more than \$750 — well under the prior limit. (JA 60); see List of Contributions. Had Fredman used his "best possible efforts" earlier, he could have raised additional funds under the \$1,075 contribution limit, just as other candidates did.

The First Amendment impact on SMGPAC was equally limited. Again, there is nothing in the record to suggest that SMGPAC made any effort to raise money or to spend it on political speech for the year after Fredman established his campaign committee, except to make the maximum contribution to his campaign. (JA 44.) Nor, during that time, did SMGPAC raise additional funds that could have been given to Fredman when the suit succeeded — or that could have been spent independently in his support had the suit failed. (JA 44).

3. There is no record evidence of any impact on the speech or associational rights of anyone else.

4. The affidavit, which was submitted with plaintiffs' reply brief on appeal, is reprinted at JA 59-62, but the List of Contributions is included only in the original record.

Notwithstanding the paltry evidence of First Amendment impact, the district court applied strict scrutiny to Missouri's contribution limits. In addition, in examining the state's interests in preventing real or perceived corruption, the court imposed a heightened evidentiary standard recommended by plaintiffs on the theory that *Buckley*'s evidentiary analysis was no longer good law. See *Shrink*, 5 F. Supp. 2d at 737. The court nevertheless determined that Missouri established its compelling interest in "eliminating or at least limiting that perception." *Id.* at 738 (citing affidavit of Senator Goode); see *id.* at 738-39 & nn.6-8 (citing evidence and press reports of contributions ranging from \$20,000 to \$420,000). The court also found that Missouri's limits were not "different in kind" from the \$1,000 limit upheld in *Buckley* and were thus narrowly tailored to serve that interest. See *id.* at 740-41. The court concluded:

[T]o hold that in the context of contribution limits on state elections, the monetary limits approved of in *Buckley* are invalid would, in the Court's view, constitute an indirect — but still improper — overruling of that decision.

Id. at 741-42.

On appeal, a fractured Eighth Circuit panel reversed and enjoined Missouri's limits. Ruling that strict scrutiny applied automatically to every case involving contribution limits, two judges challenged Senator Goode's credibility, ignored the other evidence cited by the district court, and concluded that Missouri had not even raised a question of fact as to its interest in preventing the appearance of corruption. See *Shrink*, 161 F.3d at 521-22. Noting that *Buckley* was decided "[u]pon a record more slender than the one before [the Eighth Circuit]," the dissenting judge stated: "In rejecting the state's evidence,

the Court sidesteps binding Supreme Court precedent and fails to provide meaningful guidance to those who might hope to craft campaign finance reform legislation that will survive this Court's unprecedented scrutiny." *Id.* at 524, 527.

The Eighth Circuit also considered whether Missouri's limits were narrowly tailored to serve its asserted interest or were, instead, "different in kind" from the \$1,000 limit upheld in *Buckley*. Two judges concluded that inflation since *Buckley* was decided could not alone create constitutionally cognizable differences in kind between Missouri's limits and the federal limit in effect for the past 25 years. *See id.* at 523 (Ross, J., concurring); *id.* at 524-25 (Gibson, J., dissenting). Only one judge was willing to rest his constitutional analysis on the pure numerical difference between \$1,075 today and \$1,000 in 1976 dollars. *See id.* at 523 & n.4.

SUMMARY OF ARGUMENT

The basic principles required to decide this case have been settled law since *Buckley* upheld the constitutionality of \$1,000 per election limits on contributions to federal candidates. The record in this case provides no basis for disturbing either that holding or *Buckley*'s analysis of contribution limits. Because the Eighth Circuit decision is directly at odds with the reasoning and conclusions of *Buckley*, this Court should reverse the decision below.

Three basic principles, taken together, require reversal in this case. First, as this Court found in *Buckley*, contribution limits ordinarily do *not* impose a severe burden on First Amendment freedoms and are therefore subject to less than strict scrutiny. *See* 424 U.S. at 20-22, 25. The most exacting review is appropriate only when limits severely interfere with the ability of candidates or organizations to aggregate enough

contributions to conduct effective advocacy, *see id.* at 21-22, which is manifestly not the case here. Reaffirming this longstanding principle would be consistent with the Court's "flexible" approach to constitutional review of other laws governing the electoral process. There is no reason why the Court should depart from its usual First Amendment jurisprudence and treat contribution limits as a "litmus test" for the standard of review, as the Eighth Circuit did in this case. *See* Point I.

The second principle comes into play when a state defending contribution ceilings seeks to establish its interest in avoiding the reality or appearance of corruption — interests that have been recognized as "compelling," *FEC v. National Conservative Political Action Comm. [NCPAC]*, 470 U.S. 480, 496-97 (1985), and are thus clearly "sufficiently important" to sustain such limits. *See Buckley*, 424 U.S. at 25. Under that principle, such interests do not require extensive empirical verification. Anecdotal evidence of *actual* corruption sufficed in *Buckley*, and the Court regarded the *appearance* of corruption as "inherent" in a system of large monetary limits. *Id.* at 27, 28, 30. Such a pragmatic evidentiary standard is the only one consistent with the undeniable fact that the distortions of the democratic process flowing from large campaign contributions, which may disastrously erode public confidence in government, "can never be reliably ascertained." *Id.* at 27. This Court should therefore reject the elevated evidentiary burden invented by the Eighth Circuit, which effectively makes it impossible for states to control the undue influence of money on their elected officials. *See* Point II.

Finally, *Buckley* appropriately establishes a principle of great deference to legislative judgment about the particular level at which to set contribution limits. No one — and certainly not an appointed judge — is in a better position than

legislators themselves to know the point at which money threatens to subvert political processes or appears to do so. Even when contribution limits are enacted by means of ballot initiatives, the voters are in a better position than courts to ascertain at what level contributions give the appearance of corruption. Courts should therefore exercise great restraint before attempting to fine-tune contribution ceilings that have a limited effect on legitimate First Amendment interests. *See* Point III.

The decision below refuses to acknowledge these basic principles. The majority used an inflexible "litmus test" in applying strict scrutiny to Missouri's \$1,075 contribution limit. The court also erected an insuperable evidentiary threshold for proof of the state's interest in combating real or perceived corruption, by requiring "demonstrable proof" of "genuine problems," including proof that the public perception of impropriety was "objectively reasonable." The Chief Judge was even prepared to second-guess the legislature's judgment about the appropriate level of contribution limits, without even asking whether the limit severely limited candidates' ability to amass sufficient funds for effective advocacy. Having begun with the wrong premises, the Eighth Circuit arrived at the wrong conclusion, and its decision should be reversed.

ARGUMENT

I.

Under *Buckley*, and This Court's More Recent Election Law Precedents, Missouri's Contribution Limits Are Subject to, at Most, Intermediate First Amendment Scrutiny.

States have considerable leeway to protect the integrity and reliability of election processes. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (noting that "States may, and inevitably must, enact reasonable regulations of . . . elections"); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . ."). In recognition of that latitude, the Court has refused to apply a "litmus-paper test" in evaluating ballot-access provisions that are alleged to inhibit First Amendment freedoms. *Storer v. Brown*, 415 U.S. 724, 730 (1974). The same reasoning mandates application of a flexible standard when the Court is considering regulations of campaign financing.

In fact, *Buckley*'s analysis of campaign finance regulations represents an early application of the Court's flexible First Amendment jurisprudence. *Buckley* pointedly distinguished between provisions that imposed "little direct restraint" on speech or association and those that had a "severe" impact, 424 U.S. at 21, reserving strict scrutiny only for the latter. Because FECA's \$1,000 limit had only a "limited effect on First Amendment freedoms," the Court applied a "rigorous" — but less than "strict" — standard of review to that provision. *Id.* at 29; *see Vannatta v. Keisling*, 151 F.3d 1215, 1220 (9th Cir. 1998) ("[W]hile contribution limits are reviewed under a

rigorous level of scrutiny, they are not reviewed under strict scrutiny.”) (internal quotations omitted), *cert. denied*, 119 S. Ct. 870 (1999). The similarly limited effect of Missouri’s limits warrants less than strict scrutiny in this case as well.

A. This Court’s Flexible Standard for Reviewing Regulations of the Electoral Process Also Applies to Laws Regulating the Size of Contributions to Candidates.

In recent years, this Court has firmly rejected a *per se* rule for evaluating First Amendment challenges of electoral regulations. See *Buckley v. American Constitutional Law Found.* [“*ACLF*”], 119 S. Ct. 636, 642 (1999); *Timmons*, 520 U.S. at 358. Even when contested provisions have affected core political speech, as they did in *ACLF*, the Court has not mechanically invoked strict scrutiny. See *ACLF*, 119 S. Ct. at 639-40. Instead, the Court has made “‘hard judgments’” about the “‘character and magnitude’” of First Amendment impact and has varied the standard of review accordingly. *Id.* at 642 (quoting *Storer*, 415 U.S. at 730); *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Under the Court’s impact-sensitive approach:

Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Timmons, 520 U.S. at 358 (internal quotations omitted). This “flexible standard” ensures that courts do not “tie the hands of States” seeking to protect the integrity of their electoral

processes. *ACLF*, 119 S. Ct. at 654 (O’Connor and Breyer, JJ., concurring in the judgment in part and dissenting in part); *Burdick*, 504 U.S. at 433.

The flexible standard has been applied in a wide range of cases involving electoral regulations. The *Timmons* Court determined that the First Amendment burdens imposed by a ban on “fusion” candidacies for elected office were not “severe” and thus that “the State’s asserted regulatory interests need only be ‘sufficiently weighty to justify the limitation.’”⁵ 520 U.S. at 363-64 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). The Court has also found that the burden on associational rights imposed by a ban on write-in voting was “reasonable,” not severe, and therefore within the state’s regulatory power. *Burdick*, 504 U.S. at 440 n.10. By contrast, the Court recently struck down a law requiring petition circulators to wear name tags, after finding that the requirement imposed a “severe” restraint on speech. *ACLF*, 119 S. Ct. at 645. The use of the flexible standard in these very different contexts shows how the Court guards against “undue hindrances to political conversations and the exchange of ideas,” *id.* at 642, without resorting to a “bright line [that] separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.” *Timmons*, 520 U.S. at 359.

The policy supporting use of a flexible standard in the ballot access cases justifies the same impact-sensitive approach when courts review challenges of campaign finance regulations. Indeed, the states’ need for “leeway” when protecting the

5. Whether the *Timmons* Court properly assessed the burden imposed by the fusion ban is open to question; that the Court selected the standard of review based on that assessment is not.

integrity of their electoral processes is even more pressing when "money is paid to, or for, candidates" than when citizens circulate petitions for ballot initiatives. *ACLF*, 119 S. Ct. at 642, 648. After all, large campaign contributions carry an "inherent" risk of real or perceived corruption, *Buckley*, 424 U.S. at 27, rather than the more "remote" danger that attends the ballot initiative process. *Meyer v. Grant*, 486 U.S. 414, 427 (1988); see *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."). A blunderbuss approach that applies strict scrutiny to every campaign finance regulation, irrespective of its actual impact on First Amendment freedoms, thus makes no sense as a matter of logic or policy. Nor is it consistent with *Buckley*, the leading campaign finance precedent.

B. Under the Flexible Standard, Adumbrated in *Buckley*, Missouri's Contributions Limits Are Subject to Less Than Strict Scrutiny.

Buckley recognized a distinction between a \$1,000 contribution ceiling with a "limited effect upon First Amendment freedoms," 424 U.S. at 29, and a hypothetical cap that would impose a "severe" burden on speech and association by "prevent[ing] candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21. Based on that distinction, and the difference generally between campaign finance regulations that had a severe First Amendment impact and those that did not, *Buckley* in turn adopted a flexible standard of review. The Eighth Circuit ignored that distinction in concluding that strict scrutiny applies to *all* campaign finance provisions, including contribution limits, irrespective of their effect on speech or association. Because the record in this case demonstrates that Missouri's

limits had a negligible effect on First Amendment freedoms, the limits should have been subject to less than strict scrutiny.

1. *Buckley* Applied a Flexible Standard When Evaluating Contribution Limits.

Buckley's analysis of contribution limits is consistent with the Court's approach to electoral regulations in other contexts. In its introductory discussion, *Buckley* discarded three proposed litmus tests for determining the applicable standard of review. The Court rejected the plaintiffs' claim that "contributions and expenditures are at the very core of political speech, and that the Act's limitations thus constitute restraints on First Amendment liberty that are both gross and direct." 424 U.S. at 15; see *id.* at 21 ("A limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication . . ."). But the Court also rebuffed the government's arguments that the limitations should be categorized merely as conduct — or as time, place, and manner regulations — which would automatically trigger lesser constitutional scrutiny. See *id.* at 16-18. Instead, *Buckley* adopted a nuanced approach — one that required assessment of the impact of such limits on legitimate First Amendment interests — and assigned the standard of review accordingly.

In evaluating FECA's contribution limits, *Buckley* expressly contrasted the \$1,000 limit, which entailed "only a marginal restriction upon the contributor's ability to engage in free communication," with a hypothetical limit that "could have a severe impact on political dialogue." *Id.* at 20-21. The \$1,000 limit involved "little direct restraint" because the mere act of contributing does not communicate the donor's reason for giving, and the size of the contribution is, at best, "a very rough index of the intensity of the contributor's support." *Id.* After

all, \$100 may mean much to a person of moderate means, who only rarely can afford to make contributions, while wealthy donors regard the sum as a signal of the most reluctant assistance. The ceiling thus allowed contributors to use money as a signal of general support for a candidate and did not otherwise affect their ability to discuss candidates and issues. *See id.* at 21.

FECA's \$1,000 contribution limit therefore contrasts starkly with the restrictions on petition circulators recently struck down in *ACLF*. A "circulator must endeavor to persuade electors to sign the petition," and that endeavor "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *ACLF*, 119 S. Ct. at 646 (quoting *Meyer v. Grant*, 486 U.S. at 421). But the sending of a check to a candidate does not involve the one-on-one "interactive communication concerning political change" issue that so concerned the *ACLF* Court. *Id.* at 639 (internal quotations omitted). Indeed, a campaign contributor who uses a big check to buy access to candidates or to pressure them to change their positions is engaged in illegitimate influence buying — a threat to democracy that contribution limits properly seek to prevent. *See Buckley*, 424 U.S. at 26-27. The \$1,000 ceiling thus does not severely burden expression but rather "primarily target[s] the electoral process, imposing only indirect and less substantial burdens on communication." *ACLF*, 119 S. Ct. at 654 (O'Connor and Breyer, JJ., concurring in the judgment in part and dissenting in part).

The *Buckley* Court comfortably concluded that the \$1,000 limit would not have a severe speech impact because there was nothing in the record to suggest that the cap would have "any dramatic effect on the funding of campaigns and political associations." 424 U.S. at 21. The Court noted that the ceiling would affect only 5% of the contributions raised in the most

recent election. *See id.* at 22 n.23. The basic effect of the contribution cap would therefore be merely to require candidates to raise funds from more people and to require donors who would otherwise give more than the limit to use their surplus funds for another form of political expression. *See id.* at 22.

The Court's analysis of the associational impact of contribution limits replayed the same themes. The Court noted that the \$1,000 limit allowed contributors to align themselves with a candidate and "to pool their resources in furtherance of common political goals." *Id.* The cap did limit "one important means" of associating with a candidate or committee. *Id.* But the First Amendment burden was not severe because other avenues for political association remained open, and "the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy." *Id.* After 25 years under the \$1,000 limit, we now know that the Court's assessment was correct, because PACs and candidates have in fact been able to amass huge sums for federal campaigns. (JA 29-30.)⁶

In sum, *Buckley* recognized that a \$1,000 contribution limit imposes only an indirect and limited burden on legitimate First Amendment interests. *See Buckley*, 424 U.S. at 29; *id.* at 59 ("The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging on the rights of individual citizens and candidates to engage in political debate

6. The Federal Election Commission reports that in 1998 the 132 Senate candidates raised more than \$244 million, and the 1,154 House candidates raised more than \$420 million. *See* <<http://www.fec.gov/press/cn30981.htm>> (visited Apr. 5, 1999).

and discussion.”). The ceiling imposes no direct or substantial burden on contributors’ interests in political expression or association with a candidate, because those interests can be satisfied with a \$1,000 contribution, and other avenues for signaling approval of or alignment with a candidate remain open.⁷ See *id.* at 21-22. Nor is there any direct or substantial adverse impact on the interest of contributors and candidates in amassing enough funds for effective advocacy, because very large sums can be aggregated under the \$1,000 limit.

Because FECA’s \$1,000 contribution limit did not impose a severe burden on speech or associational rights, the Court did not require a demonstration that the cap was “narrowly tailored” to serve a “compelling state interest.” Nor did the Court apply a “least restrictive means” test when assessing the constitutionality of the contribution limit.⁸ Rather, the Court looked for a “sufficiently important interest” to justify the ceiling and asked that the limit be “closely drawn” to further that end. *Id.* at 25. *Buckley* concluded that “weighty interests” in real and apparent electoral integrity were “sufficient to justify the limited effect upon First Amendment freedoms

7. In fact, *Buckley* upheld a complete ban on private contributions in the context of FECA’s voluntary public funding scheme for major party presidential candidates in general elections. See 424 U.S. at 95 n.129; *Republican Nat’l Comm. v. FEC*, 487 F. Supp. 280, 286-87 (S.D.N.Y.), *aff’d mem.*, 445 U.S. 955 (1980). Contributors thus have no cognizable First Amendment complaint, even when the opportunity to make contributions is withdrawn completely, as long as the system continues to fuel candidates’ campaigns, and the law “does not in any way infringe the contributor’s freedom to discuss candidates and issues.” *Id.* at 21.

8. Indeed, the Court upheld the \$1,000 ceiling in spite of the fact that disclosure requirements (rather than contribution limits) “appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption.” *Buckley*, 424 U.S. at 68.

caused by the \$1,000 contribution ceiling.” *Id.* at 29. In other words, without saying so explicitly, *Buckley* applied an intermediate level of First Amendment scrutiny to FECA’s \$1,000 contribution limit.⁹ Cf., e.g., *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (describing intermediate standard of review as one in which regulations “need only be tailored in a reasonable manner to serve a substantial state interest”).

Buckley’s failure to articulate the standard of review explicitly generated some early controversy on the Court. In *California Medical Association v. FEC*, the plurality clearly concluded that contribution limits were not entitled to the highest level of constitutional scrutiny. See 453 U.S. 182, 196 (1981) (“[T]he ‘speech by proxy’ that [plaintiff] seeks to achieve through its contributions . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.”). On the other hand, Justice Blackmun argued that *Buckley* applied a single “rigorous” standard, which he appeared to identify with strict scrutiny. See *id.* at 202 (Blackmun, J., concurring in part and concurring in the judgment). In Justice Blackmun’s view, FECA’s limits on contributions to candidates had survived such scrutiny in

9. The difference between strict scrutiny and *Buckley*’s “rigorous” but less searching level of review is generally associated with the Court’s distinction between expenditures and contributions, rather than a distinction among contribution limits with different kinds of First Amendment impact. See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) (“We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.”); see also *ACLF*, 119 S. Ct. at 653 n.7 (Thomas, J., concurring in the judgment) (asserting that *Buckley* purported to apply strict scrutiny to all of FECA’s restrictions but that the Court “seemed more forgiving in its review of the contribution provisions than it was with respect to the expenditure rules”). The distinction between contributions and expenditures is not at issue in this case.

Buckley, and the Act's limits on contributions to political committees would do so as well. *Id.* at 202-03. More recent campaign finance cases have resolved that debate, however, by confirming *Buckley*'s adoption of a flexible standard. *See, e.g., Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) (plurality opinion) (citing cases in which the Court "weighed" affected interests in free speech and association against the state's interests in electoral integrity and legitimacy).¹⁰

By using a flexible standard, the *Buckley* Court was able to accommodate both the plaintiffs' First Amendment rights and the government's weighty interests. Because the *Buckley* plaintiffs could not establish that contribution limits had a severe burden on speech or association, the Court appropriately reduced the level of constitutional scrutiny and deferred to legislative judgments about the design of the limits. On the other hand, *Buckley* recognized the possibility that contribution limits could place a "severe" burden on speech and association if the limits had a "dramatic adverse effect" on the ability of candidates and committees to aggregate the funds necessary for effective advocacy. 424 U.S. at 21, 22. The Court did not specify the level of scrutiny that would be appropriate under those circumstance, because the \$1,000 limit had only a limited

10. Lower federal courts — outside the Eighth Circuit — have generally recognized that *Buckley* applied less than strict scrutiny to provisions with a limited First Amendment impact. *See Vannatta*, 151 F.3d at 1220; *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 650 (6th Cir. 1997) ("[W]hen core First Amendment rights are not significantly affected, the regulated speech is not entitled to full First Amendment protection."); *Driver v. DiStefano*, 914 F. Supp. 797, 801 (D.R.I. 1996) ("[I]f a statute limiting political contributions serves an important state interest, it is not rendered unconstitutional merely because it burdens First Amendment rights when the burden imposed is a relatively slight one.").

effect, but the structure of the opinion suggests that strict scrutiny of the limits would then be justified. *See id.*

The Eighth Circuit disregarded both *Buckley* and this Court's recent First Amendment jurisprudence in mechanically applying strict scrutiny to Missouri's contribution limits. The circuit's ruling cannot accommodate *Buckley*'s distinction between a \$1,000 contribution limit that had only a "limited effect" on First Amendment freedoms and a hypothetical cap that might have a "severe impact." That distinction makes sense only if *Buckley* were seeking to contrast the levels of scrutiny appropriate for two contribution limits that differed in kind. *See id.* at 30. In contemporary terms, the distinction makes sense only if *Buckley* were seeking to show how a flexible standard of review applies to contribution limits with qualitatively different First Amendment impacts. By ignoring that distinction, and refusing to analyze the First Amendment burden actually imposed by Missouri's contribution limits, the Eighth Circuit unilaterally created a special exception from the flexible standard of review otherwise applicable to electoral regulations.

There is no principled basis for the Eighth Circuit's idiosyncratic treatment of contribution limits. Indeed, as is explained above, the policy supporting flexible judicial review may be at its most urgent in this context. *See supra* Point I(A). This Court should therefore clearly and unequivocally reaffirm *Buckley*'s flexible approach to judicial review of campaign finance provisions. Specifically, the Court should confirm that such provisions, including contribution limits, are subject to less than strict scrutiny under *Buckley*, unless plaintiffs can demonstrate that the challenged restrictions will have a severe constitutional impact.

2. Missouri's Limits Do Not Trigger Strict Scrutiny Because They Do Not Have a Dramatic Adverse Effect on the Funding of Campaigns.

In 1995, Missouri enacted a \$1,000 per election limit on contributions to statewide candidates, a limit identical in size to the limit that then governed, and still governs, candidates for the federal Senate and House of Representatives. Missouri's \$1,000 limit has since been raised to \$1,075 per election — the amount that the plaintiff candidate collected from its sole contributor (plaintiff SMGPAC) before the Eighth Circuit invalidated the state's contribution ceilings. The record in this case demonstrates beyond question that the challenged limits had at most a negligible effect on the ability of candidates to aggregate funds for effective advocacy. Accordingly, under the flexible standard pre-*araged* in *Buckley* and endorsed in this Court's more recent judgments, Missouri's limits should have been reviewed under less than strict scrutiny.

Having filed a facial constitutional challenge in this case, plaintiffs "confront a heavy burden in advancing their claim" that Missouri's contribution limits violated the First Amendment.¹¹ *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2175 (1998) (internal quotation omitted); see *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (noting that

11. Arguably, because plaintiffs filed a *facial* challenge, they were required to prove that Missouri's limits burdened the rights of a substantial number of contributors and candidates, not merely their own rights. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992) (statute that burdens constitutional right in "a large fraction of cases" is unconstitutional on its face); *Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 459, 460 (11th Cir. 1996) (finding that the challenged statute would not operate unconstitutionally in most cases and therefore was not invalid on its face).

facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort"). The only evidence they introduced to this effect showed that the law's impact on speech and association was minor at best. They offered no proof of serious fundraising efforts that were thwarted by the ceilings. To the contrary, by their own admission, they made no fundraising efforts at all (except with each other) until the Eighth Circuit struck down Missouri's law.

Plaintiffs attempt to magnify the impact of the contribution limit by suggesting that, without the ceiling, Fredman could have solicited large donations soon after forming his committee and thereafter mounted a serious campaign. That strategy fails for two reasons. First, Fredman's claim is purely speculative. There are no affidavits from Fredman's supporters to suggest that even one contributor (other than SMGPAC) would *ever* have made contributions to Fredman in excess of the \$1,075 limit. Moreover, the record shows that SMGPAC did not have the funds, and had never during its entire existence raised sufficient funds, to finance Fredman's campaign singlehandedly. (JA 44, 53-58.)¹² Second, *Buckley* explicitly acknowledged that contribution limits would "require candidates to raise funds from a greater number of persons" and expressly declined to regard that fact

12. Excerpts from Campaign Disclosure Reports filed by SMGPAC were annexed as Exhibit G to the State Defendants' Suggestions in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of State Defendants' Motion for Summary Judgment, filed Apr. 3, 1998. Those reports show no disclosures prior to the 1994 general election, when SMGPAC made six contributions for a total of \$1,800. None of the reported contributions was larger than \$400. SMGPAC reported no contributions in 1995. In 1996, SMGPAC reported four contributions for a total of \$750, the largest of which was \$250.

as evidence of a severe First Amendment burden. 424 U.S. at 22. Thus even if Fredman's assertions were accepted at face value, they would establish only a minor burden on his rights.¹³

To counter plaintiffs' paltry evidence of constitutional impact, the state compiled data about candidate fundraising under \$1,000 ceilings. The statistics show that Missouri state candidates were able to raise substantial sums under the limits — often more than they did before the enactment of S.B. 650. (JA 24-28.) Those data are consistent with the experience of members of Congress, including those representing Missouri, who have conducted robust campaigns while raising funds under \$1,000 per election limits. (JA 29-30.) The state also calculated the percentage of contributions made in excess of \$2,000 (the maximum total individual contribution for the primary and general elections) in the two pre-ceiling campaigns most analogous to Fredman's. That evidence demonstrated that only about 2% of contributions were affected by Missouri's limits. (JA 34-36.) Plaintiffs offered nothing whatsoever to rebut the state's statistics.

13. Fredman's record of spending confirms the limited effect of the contribution caps. He admits that he purchased 61 30-second radio spots throughout the state for only \$1,034.12. See Exhibit 2 to Affidavit of Zev David Fredman, sworn to on Aug. 5, 1998 (annexed to plaintiffs' Reply Brief on appeal). Moreover, he had the funds for more than 50 by June 25, 1997, but did not run his first radio advertisement until July 31, 1998. See *id.*; JA 60. In other words, he did not spend a dime to advertise his candidacy until less than one month before the primary — even though the money that sat in his coffers for more than a year would have financed dozens of radio spots. Had he been a serious candidate, he could have used his existing funds to get out his message and to solicit additional support. That Fredman made no effort to communicate with the voters for more than a year, even though he unquestionably could have done so, can hardly be blamed on the contribution limits.

The facts of this case thus establish beyond doubt the very minimal First Amendment impact of Missouri's contribution limits on contributors, candidates, and political associations. Contributors could and did make monetary contributions to Missouri candidates, and in the 1994 auditor's race, about 98% of the amounts donated were unaffected by the limits.¹⁴ In view of the large sums aggregated under the limits, plaintiffs were in no position to argue that the ceilings prevented candidates from amassing the funds necessary for effective advocacy. And the few contributors who would have contributed more than \$1,000 per election, including political associations with substantial pooled resources, remained free to use the surplus amounts to support their favored candidates directly. See *Buckley*, 424 U.S. at 21-22 (identifying the expression of general support by

14. The very small percentage of affected contributions shows that Missouri's limits could not have had a dramatic impact on First Amendment freedoms. But even a contribution cap that affected a large percentage of contributions would not necessarily impose a severe burden. As experience under the federal limit shows, candidates can generally compensate for the effect of contribution ceilings by expanding their pool of contributors. Plaintiffs filing facial constitutional challenges to contribution limits before those limits have gone into effect therefore cannot carry their burden merely by showing that half or two-thirds of contributions would be affected. Plaintiffs have the burden of proving that substitute funds will be unavailable, by showing for example that the required number of new contributors is prohibitively high. Where the limits have already been implemented for at least one election cycle, as Missouri's were, plaintiffs have the burden of proving a dramatic adverse effect on a substantial number of candidates. See, e.g., *National Black Police Ass'n v. District of Columbia Bd. of Elections & Ethics*, 924 F. Supp. 270, 277-81 (D.D.C. 1996) (looking beyond percentage of affected contributions to impact on amounts actually raised and effects on candidates' ability to communicate with voters, before finding that \$100 and \$50 contribution caps "severely limit[ed] candidates' right to speak freely in the political campaign arena"), *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997). Plaintiffs in this case have not come close to making that showing.

means of a contribution, the availability of substantial funds for advocacy, the opportunity to pool resources, and the option of direct spending as evidence of the minor First Amendment impact of contribution limits).

In sum, neither the factual record nor the applicable legal precedents supports the application of strict scrutiny in this case. The undisputed evidence shows that Missouri's contribution limits have had only a minimal impact on rights of speech and association.¹⁵ This Court's cases from *Buckley* through *ACLF* demonstrate that it is inappropriate to apply strict scrutiny to a provision with such a limited effect on First Amendment freedoms. The Eighth Circuit's mechanical application of strict scrutiny is therefore clear error.

15. Although this discussion has focused primarily on Missouri's limit for statewide candidates, the analysis applies equally to the state's \$525 and \$275 per election limits governing races in smaller jurisdictions. The Eighth Circuit applied strict scrutiny to those limits, even though plaintiffs offered no evidence that the limits would have a severe impact on First Amendment freedoms. An affidavit from Albert Hasler, who was unopposed in the Republican primary for Missouri State Representative for the 84th District, states only that he would find fundraising easier if he could accept contributions larger than \$275 per election. (JA 55.) Because *Buckley* plainly ruled that such a concern did not demonstrate a severe impact on political dialogue, see 424 U.S. at 21-22, the \$525 and \$275 limits should also have been subject to less than strict scrutiny.

II.

The State Satisfied Its Burden of Proving Substantial — Indeed Compelling — State Interests in Preventing Actual or Apparent Corruption Caused by Large Contributions.

Buckley used common sense and pragmatism in assessing the sufficiency of the government's interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions." 424 U.S. at 25. Under that approach, the compelling importance of those interests cannot be questioned, unless the state has no basis whatsoever for stating that the threat presented by such contributions is real rather than "illusory."¹⁶ *Id.* at 27. Since *Buckley*, this Court has consistently reaffirmed that standard, as it must if states are to have the leeway they need to protect "the integrity of our system of representative government" and public "confidence in the system." *Id.* at 26-27 (internal quotation omitted).

The Eighth Circuit has unilaterally elevated the state's evidentiary burden to the point where it effectively precludes regulation of campaign contributions. Under the standard established by *Buckley*, by contrast, the evidence in this case is more than adequate to carry the state's burden. The Eighth Circuit decision should therefore be reversed, and the injunction against enforcement of Missouri's contribution limits should be vacated.

16. Thus, even if *Buckley* is interpreted to apply strict scrutiny to contribution limits, the Eighth Circuit committed reversible error by imposing a legally indefensible evidentiary burden on the state. Irrespective of the applicable standard of review, Missouri easily carried its burden of showing a compelling interest in preventing real and perceived corruption.

A. Under *Buckley* and Its Progeny, the Government's Interest in Preventing the Reality or Appearance of Corruption Cannot Be Questioned As Long As the Problem Is Not "Illusory."

In *Buckley*, the Supreme Court found it "unnecessary to look beyond the Act's primary purpose — to limit the actuality and appearance of corruption resulting from large individual financial contributions — in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation" established under FECA. *Id.* at 26. The Court also established a pragmatic evidentiary standard for demonstrating the state's interests in preventing such real or perceived corruption. Under *Buckley*, the government carries its burden of proving weighty interests in addressing those problems, as long as the problems are not "illusory." *Id.* at 27.

Buckley articulated this standard in evaluating the asserted federal interest in eliminating actual corruption. The Court found that "the deeply disturbing examples [of large contributions given to secure political favors] surfacing after the 1972 elections" provided adequate evidence of that interest. *Id.* at 27 & n.28. Although the record did not establish the scope of the corruption, *Buckley* concluded that isolated examples sufficed to demonstrate that "the problem is not an illusory one." *Id.* at 27. The Court realized that mere anecdotal evidence had to be enough to fulfill the government's evidentiary burden, because corrupt politicians will take great pains to conceal the exchange of influence for money, and therefore "the scope of such pernicious practices can never be reliably ascertained." *Id.*; see *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (rejecting need for empirical proof of an interest in preventing voter intimidation and election fraud and noting that such practices "are successful precisely because they are difficult to detect").

The government's burden of proof when it seeks to prevent the *appearance* of corruption is, if anything, even less demanding. According to *Buckley*, "*opportunities* for abuse *inherent* in a regime of large individual financial contributions" create an appearance of impropriety. 424 U.S. at 27 (emphasis added). Because that appearance can disastrously erode public confidence in representative government, "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical.'" *Id.* (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). The mere "opportunity for abuse inherent in the process of raising large monetary contributions" was all the proof needed to demonstrate a weighty governmental interest in "safeguarding against the appearance of impropriety." 424 U.S. at 30. A "system permitting unlimited financial contributions," carried a self-evident threat to public confidence. *Id.* at 28; cf. *Blount v. SEC*, 61 F.3d 938, 944 (D.C. Cir. 1995) (finding that "underwriters' campaign contributions self-evidently create a conflict of interest in . . . officials who have power over municipal securities contracts").

Buckley thus forecloses any doubt about the sufficiency of the government's interest in limiting the appearance or reality of corruption, unless those problems are wholly "illusory." Only if there is no evidence of the problems, if they are plainly speculative or "merely conjectural," may the government's interest in preventing them be questioned. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); see *NCPAC*, 470 U.S. at 498 (invalidating independent expenditure limit for PACs where, on the record presented, corruption "remain[ed] a hypothetical possibility and nothing more"). But if there is *any* evidence of actual or perceived corruption, or if the potential for abuse is inherent or self-evident, the government has carried its burden of proving compelling state interests in limiting large contributions. See *Buckley*, 424 U.S. at 27, 28, 30; *Blount*, 61

F.3d at 945 (“Although the record contains only allegations, no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth is great, and the legislative purpose prophylactic.”).

This threshold has not changed since *Buckley*. To the contrary, this Court has repeatedly reaffirmed the need for judicial deference to legislative judgments about the need for contribution limits. See *NCPAC*, 470 U.S. at 500 (recognizing “proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized”); *FEC v. National Right to Work Comm. [“NRWC”]*, 459 U.S. 197, 210 (1982) (“Nor will [the Court] second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.”).

Other cases involving regulation of campaigns and elections confirm that this Court does not “require elaborate, empirical verification of the weightiness of the State’s asserted justifications.” *Timmons*, 520 U.S. at 364. Nor does the Court require “demonstrable evidence” of “genuine problems,” *Shrink*, 161 F.3d at 521, before it can act to prevent injury to democratic institutions.

To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the evidence marshaled by a State to prove the predicate. Such a requirement would necessitate that a State’s political system sustain some level of damage before the legislature could take corrective action.

Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986) (internal quotations omitted). As the Court has explained: “Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.” *Id.* at 195-96; see *Turner*, 512 U.S. at 665 (“Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.”).

The same reasoning applies to at least as great an extent when states seek to establish an interest in combating the reality and appearance of corruption. Where, as here, plaintiffs cannot show that contribution ceilings will have a severe First Amendment impact, courts should not become embroiled in endless battles over the sufficiency of the state’s evidence. Because plaintiffs did not make that showing in this case, the Eighth Circuit committed a second fatal mistake in disregarding this Court’s deferential standard for establishing an interest in preventing real or perceived corruption.

B. The Eighth Circuit’s Insurmountable Evidentiary Threshold Is Unsupported by Law or Policy.

The decision below asserts that states seeking to justify contribution limits must show “demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place.” *Shrink*, 161 F.3d at 521. Moreover, to carry that burden, the state must additionally prove that any perceived corruption is “objectively ‘reasonable.’” *Id.* at 522 (quoting *Russell v. Burris*, 146 F.3d 563, 569 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 510 (1998) & 119 S. Ct. 1040 (1999)). Needless to say, no evidence

presented to the Eighth Circuit has ever been sufficient to satisfy that test. See *Shrink*, 161 F.3d at 522; *Russell*, 146 F.3d at 569-70. The Eighth Circuit's standard obliterates the difference between real and perceived corruption, has no legal support, and should be unequivocally repudiated.

The Eighth Circuit first established its idiosyncratic evidentiary standard last year in *Russell v. Burriss*, which struck down contribution limits for Arkansas candidates.¹⁷ In construing its requirement, the *Russell* court repeatedly complained of Arkansas' failure to show that any legislator had changed his vote in exchange for campaign contributions, violated the pre-existing contribution limits, or illegally concealed the source of his contributions. See 146 F.3d at 569-70. The Eighth Circuit thus construed its evidentiary test to require that any perception of corruption be based on actual *quid pro quo* exchanges of money for votes or on other patently unlawful conduct. So understood, the Eighth Circuit's "objective reasonableness" test, introduced in *Russell* and applied in this case, obliterates the distinction between the appearance and reality of corruption.

As the district court in this case recognized, however: "A perception of influence peddling is a 'real harm' regardless of whether such peddling is actually afoot." *Shrink*, 5 F. Supp. 2d at 738. The "real harm of perceived corruption" (actual public distrust of candidates and elected officials who accept large contributions) should not be confused with "real corruption" (actual improper influence of candidates and officials by

17. There does not appear to be any other court in the country, state or federal, that has refused to uphold contribution limits on the ground that the perception of corruption caused by large contribution limits was not shown to be "objectively reasonable."

monied interests). Maintaining the distinction means rejecting the Eighth Circuit's evidentiary test.

The Eighth Circuit's only attempt to defend its insurmountable threshold appears in a footnote, see 161 F.3d at 522 n.3, where the court quotes from *United States v. National Treasury Employees Union*, ["NTEU"], 513 U.S. 454 (1994). In *NTEU*, this Court stated:

[W]hen the Government defends a regulation on speech . . . it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, . . . and that the regulation will in fact alleviate these harms in a direct and material way.

Id. at 475 (internal quotations omitted). But that passage provides no support for the extremely onerous Eighth Circuit test. The "real" harm referred to in *NTEU* is an just alternative term for harm that is not "illusory" under *Buckley*.

NTEU involved a challenge to a ban on honoraria given to federal executive branch employees below grade GS-16 for activities having nothing to do with their jobs. The mean salary of affected class members was no more than \$36,123 in 1993. But the government had only "limited evidence of actual or apparent impropriety by legislators and high-level executives" and concerns for administrative convenience to justify the ban. *Id.* at 472. The *NTEU* Court agreed that "Congress could reasonably assume that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate [an] appearance of improper influence." *Id.* at 473 (emphasis added). But the Court refused to extend the assumption to low-level federal employees "with negligible power to confer favors on those who might pay to hear them speak or read their

articles.” *Id.* But see *id.* at 494 (Rehnquist, C.J., dissenting) (supporting deference to the government’s determination that the appearance of impropriety required a ban on honoraria for all employees).

Under this reasoning, if honoraria to high-level officials had been at stake in *NTEU*, the government could have established its interest with nothing more than “limited evidence of actual or apparent impropriety.” *Id.* at 472. Indeed, the *NTEU* Court was prepared to have Congress *assume* that honoraria paid to such officials would generate an appearance of improper influence. See *id.* at 473. *NTEU* thus does not impose a new standard for establishing an interest in preventing actual or apparent corruption of legislators and other elected officials — the harm that is at issue in the case before this Court. To the contrary, *NTEU* reaffirms that Congress may regulate payments to such officials on the basis of anecdotal evidence or self-evident assumptions about how such payments will be perceived. When those officials are concerned, what counts as evidence of “real harm” from actual or apparent impropriety under *NTEU* is precisely what counts as evidence that real or perceived corruption is not an “illusory” problem under *Buckley*.

The *NTEU* Court’s treatment of honoraria paid to low-level employees also confirms the time-honored standard established in *Buckley*. The *NTEU* Court struck down the honoraria ban as applied to such workers, because there was “no evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16.” *Id.* at 472 (emphasis added); see *id.* at 485 (O’Connor, J., concurring in the judgment in part and dissenting in part) (rejecting a “bare assertion” of interest made “without any showing that Congress considered empirical or anecdotal data pertaining to abuses by lower-echelon executive employees”) (emphasis added). Only

when the posited harms were matters of “mere speculation,” with *no* evidence whatsoever to support them, was the Court prepared to find that the government had not carried its burden. *Id.* at 475.¹⁸ The Eighth Circuit’s requirement that states produce “demonstrable evidence” of an “objectively reasonable” perception of corruption thus finds no support in *NTEU*.

Not only is the Eighth Circuit’s evidentiary standard legally unsupported but it is also indefensible as a matter of policy. Courts should not be required to leave common sense at the door when states assert interests in preventing real and perceived corruption. Cf. *Burson*, 504 U.S. at 211 (relying on “a substantial consensus, and simple common sense” in finding a need for regulation); *Turner*, 512 U.S. at 665-66 (suggesting that courts may accept “sound reasoning” in support of regulatory measures when “complete empirical support” is not available) (internal quotations omitted). When there are absolutely no limits on the amounts of permissible campaign contributions, as was the case in Missouri before enactment of S.B. 650 and is the case now, the potential for abuse is incontrovertible. When contributors are in fact donating large sums to persons who, if elected to office, will have the power to grant special favors, a state should not have to prove more before it is authorized to take reasonable steps — steps that are non-discriminatory and do not have a severe First Amendment impact — to eliminate the risk of real or perceived corruption.

This Court should therefore reaffirm clearly the minimal burden of proof established in *Buckley*. As long as there is

18. Cf. *Edenfeld*, 507 U.S. at 771 (rejecting the asserted justification for regulation because the record did not disclose “any anecdotal evidence” in its support).

some basis for finding actual or apparent corruption — whether anecdotal evidence, common sense, or sound reasoning — the government has carried its burden of showing weighty, indeed compelling, interests in preventing real or apparent corruption. *See, e.g., NRWC*, 459 U.S. at 210 (“[W]e accept Congress’ judgment that it is the potential for such influence that demands regulation.”). That proof suffices to show that the posited harms are “real,” and courts may not legitimately demand more.

C. The Evidence Amply Demonstrates the State’s Compelling Interest in Eliminating the Appearance of Corruption Caused by Large Contributions.

Under the standard established by this Court’s precedents, the state unquestionably demonstrated an interest in eliminating the appearance of corruption. Because Missouri imposed no limit whatsoever on contributions until it passed S.B. 650, the potential for corruption was inherent in the system. But even if this Court demands more than the common sense argument accepted in *Buckley* and *NTEU*, the record amply establishes that perceived corruption was a problem in Missouri before its legislature enacted the challenged contribution limits.

1. Prior to Senate Bill 650, the Appearance of Corruption Was Inherent in Missouri’s Regime of Unlimited Contributions.

The key fact about this case that brings it squarely within the reasoning of *Buckley* is that S.B. 650 replaced a system permitting completely unlimited campaign contributions. *Buckley* expressly recognized that opportunities for abuse were “inherent” in such a system and that those opportunities created an appearance of corruption. 424 U.S. at 27, 30. When a system sets *no* limits on the amount of contributions that may be made — as did the federal system before *Buckley* and

Missouri’s system before enactment of the limits challenged here — the potential for corruption is self-evident. This Court can therefore find as a matter of law that Missouri has established its interest in avoiding the appearance of corruption.¹⁹

2. The Documented Facts Further Demonstrate That the Campaign Finance System That Existed Before Missouri Enacted Contribution Limits Created an Appearance of Corruption.

Even if proof of more than self-evident opportunities for abuse were required, there is substantial record evidence to support the state’s interest in reducing the appearance of corruption. First, Missouri had repeatedly sought to enact contribution limits, not only in S.B. 650, but also in Proposition A. The fact that S.B. 650’s contribution limits commanded a majority of the legislature, and that Proposition A’s *even* lower limits commanded 74% of the electorate, suffices “to demonstrate that there is at least an appearance of corruption that must be addressed.” *California ProLife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1295 (E.D. Cal. 1998), *aff’d*, 164 F.3d 1189 (9th Cir. 1999); *see Shrink*, 5 F. Supp. 2d at 738 & n.7 (noting that the enactment of Proposition A could be regarded as a sort of “poll” on the existence of a perceived threat to the state’s election process). The fact that proponents of the initiative publicly described it as an effort to

19. The question whether the specific contribution limits established by S.B. 650 were closely drawn to prevent the harm inherent in a system of unlimited contributions is a separate question discussed in Point III. Two judges on the Eighth Circuit panel opined that the limits did not differ in kind from the \$1,000 limit upheld in *Buckley*; *see Shrink*, 161 F.3d at 523 (Ross, J., concurring), *id.* at 524 (Gibson, J., dissenting), which was precisely focused on the problem of large contributions, *see* 424 U.S. at 28.

"temper the influence of special interests" and to end a "money-influenced" political system, is further evidence of perceived corruption. *Shrink*, 5 F. Supp. 2d at 738 n.7.

Newspaper articles and editorials published shortly before the enactment of S.B. 650 provide yet more evidence of the appearance of corruption in Missouri at the relevant time. See *id.* at 738 nn. 6-7.²⁰ The press reported that Missouri candidates and elected officials were receiving contributions in amounts as high as \$20,000 and \$40,000 and suggested that suspicious correlations between the payments and acts in office made the "central issue" one of "trust." *Id.* at 738 n.6 (quoting Editorial, *The Central Issue Is Trust*, St. Louis Post-Dispatch, Dec. 31, 1993, at 6C (reporting that the state's treasurer had awarded state business to a bank that had contributed \$20,000 to his campaign), and citing Jo Mannies, *Auditor Race May Get Too Noisy to Be Ignored*, St. Louis Post Dispatch, Sept. 11, 1994, at 4B (reporting that a candidate for auditor had received a \$40,000 contribution from a brewery and a \$20,000 contribution from a bank)). Missouri Governor Carnahan's support for contribution limits also reflected concern about the apparent undue influence of big money on politics. See *id.* (citing John A. Dvorak, *Election Reform Backed Lid on Contributions to Campaigns Wins Carnahan's Support*, Kansas City Star, Nov. 14, 1993, at B1 (quoting the Governor as stating, "We need a system that will make sure that our democratic institutions care as much about John Doe and Jane

20. The district court in this case was entitled to take judicial notice of these publications. See *In re Petition of Lauer*, 788 F.2d 135, 137 (8th Cir. 1985) ("[T]his court takes judicial notice of numerous letters appearing in metropolitan newspapers . . ."); see also *Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1356 n.12 (3d Cir. 1994) ("We take judicial notice of newspaper accounts . . .").

Doe as they do about any big company or any wealthy individual.")).

Reports about \$20,000 and \$40,000 contributions are probative of the state's interest in combating perceived corruption. In *Buckley*, the Court considered a \$2,000,000 contribution from the dairy industry and contributions from six individuals totaling \$3,000,000 evidence that the risk of corruption was not illusory. See 424 U.S. at 27 & n.28 (referring to examples discussed by the Court of Appeals, *Buckley*, 519 F.2d 821, 839-40 & nn.36-38 (D.C. Cir. 1975)). Even though those contributions far exceeded FECA's \$1,000 limit, the Court flatly rejected the claim that the limit was "unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder." 424 U.S. at 30. *Buckley* thus makes it clear that the state does not need to show that contributions immediately over the limit would create the appearance of corruption. Far larger contributions may establish the state's interest in eliminating that appearance.

In addition to the foregoing evidence, the record contains an affidavit from Missouri State Senator Wayne Goode, who had served for a total of 35 years in the state legislature, first in the House and then in the Senate. (JA 46-47.) Senator Goode stated that he was a co-chair of the Interim Joint Committee on Campaign Finance Reform, which recommended adoption of the contribution limits in Senate Bill 650. (JA 46.) He represented that, before recommending those limits, the committee conducted hearings and internal discussions on both the costs of campaigning and the point at which contributions could become unduly influential. (JA 46.) The consensus of the committee was that the contribution limits challenged here were necessary to balance the need to run an effective campaign

with the need to avoid the appearance of buying legislative votes. (JA 47.)²¹

Senator Goode also opined that both the appearance of corruption and the potential for actual corruption had decreased since implementation of the limits. *See id.* He was joined in that view by John W. Maupin, former Missouri Ethics Commission member and chair. *See id.* at 48-49. The affidavits of Senator Goode and Mr. Maupin, together with all of the foregoing evidence, unquestionably demonstrate Missouri's compelling interest in eliminating the appearance of corruption created by contributions over the current limits.

The Eighth Circuit either ignored or improperly discounted the evidence of the state's interest. The court appears to have forgotten its own prior decision in *Carver*, where it acknowledged that "an overwhelming 74 percent of Missouri voters 'determined that contribution limits are necessary to combat corruption and the appearance thereof'" and admitted that this fact "may address the desirability of campaign contribution limits." 72 F.3d at 640 (quoting *Carver*, 882 F. Supp. 901, 905 (W.D. Mo. 1995)). The court also ignored the press reports cited by the district court in this case.²²

21. *Cf. Friedman v. Rogers*, 440 U.S. 1, 12 (1979) ("The concerns of the Texas Legislature about the deceptive and misleading uses of optometrical trade names were not speculative or hypothetical, but were based on experience in Texas with which the legislature was familiar. . . ."). In *Friedman*, references to a prior court decision, which in turn cited only anecdotal evidence of misleading practices, sufficed to prove the state's interest in adopting the challenged regulation.

22. The court's disregard of this evidence is especially egregious in view of its complaint that Senator Goode "pointed to no evidence that 'large' campaign contributions were being made in the days before limits were in place, much less that they resulted in real corruption or the

The Eighth Circuit could not ignore the affidavit of Senator Goode. The court therefore dismissed it as self-serving, citing "the senator's vested interest in having the courts sustain the law that emerged from his committee."²³ *Shrink*, 161 F.3d at 522. But the Eighth Circuit could not properly rule on the credibility of witnesses when reviewing a decision on summary judgment. *See Oldham v. West*, 47 F.3d 985, 989 (8th Cir. 1995) ("[A] credibility determination is inappropriate in ruling on a motion for summary judgment.") (internal quotations omitted). Indeed, because plaintiffs did not contest either the substance of the Senator's allegations or his credibility as a witness, the court should have concluded as a matter of law that Missouri established its interest in limiting perceived corruption. *See Lundeen v. Cordner*, 354 F.2d 401.

perception thereof." *Shrink*, 161 F.3d at 522. That evidence appeared in the court's own opinion in *Carver*, which mentioned a \$420,000 contribution and the subsequent passage of Proposition A. *See* 72 F.3d at 640, 642. The *Carver* court could not deny the "desirability" of contribution limits, so it complained that the limits were the lowest in the nation. *See id.* at 642. Of course, when the Eighth Circuit faced a \$1,075 limit, *Carver's* approach was not an option. So in its hostility to *Buckley*, and campaign contribution limits in general, the court instead ignored the evidence of desirability.

23. The Eighth Circuit also complained that it had no way of knowing whether the public shared Senator Goode's perception of corruption or whether the perception "derived from the magnitude of . . . contributions that historically have been made to candidates running for public office in Missouri." *Shrink*, 161 F.3d at 522 (internal quotations omitted). That criticism is hardly credible, given that the Interim Committee, a majority of the legislature, and 74% of Missouri voters supported the limits. Moreover, there would be no reason for the citizens and their representatives to enact contribution ceilings if their perception of corruption did not derive from knowledge that large contributions were being made to Missouri candidates.

409 (8th Cir. 1966) (requiring production of specific facts to put credibility in issue and thereby defeat summary judgment).

The Eighth Circuit's assertion that the state failed even to create an issue of fact as to its interest in enacting contribution limits rests on legal error and a refusal to acknowledge the undisputed evidence. Under the standard established in *Buckley* and its progeny, the Court of Appeals had more than enough proof of Missouri's interest in reducing the appearance of corruption. In addition, a majority of the panel recognized that Missouri's limits were no different in kind from the \$1,000 limit upheld in *Buckley*, so this Court need not address the question whether the legislature set the limits at the proper levels. Rather, this Court should reverse the Eighth Circuit decision and vacate the injunction against enforcement of Missouri's contribution ceilings.

III.

Missouri's Limits Did Not Differ in Kind from the \$1,000 Limit Upheld in *Buckley*.

The foregoing analysis demonstrates that there are no genuine issues of material fact regarding the impact of Missouri's contribution limits or the state's interest in alleviating the harm of perceived corruption. The undisputed evidence shows that the impact on First Amendment rights is minimal and that the harm to public confidence is real. As a matter of law, this Court may therefore defer to legislative judgment about the levels of the limits and reverse the decision of the Court of Appeals — without further discussion. In that event, one issue that divided the Eighth Circuit panel will remain unresolved: how courts should interpret *Buckley*'s admonition to avoid "fine tuning" contribution limits, unless they are "differen[t] in kind" from the \$1,000 federal limit. See

424 U.S. at 30. This Court could eliminate the confusion about that question by explaining clearly that differences in kind exist between FECA's contribution limit and other contribution caps, when the latter impose the severe burdens on First Amendment freedoms not imposed by the \$1,000 federal ceiling.

A. Contribution Limits Do Not Differ in Kind from the \$1,000 Limit Upheld in *Buckley*, Unless They Have Dramatic Adverse Effects on Candidates' Ability to Aggregate the Funds Necessary for Effective Advocacy.

Under *Buckley* and its progeny, a contribution limit satisfies First Amendment scrutiny when:

[it] focuses precisely on the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.

424 U.S. at 28. Under those circumstances, the limit is sufficiently tailored to the state's weighty interests in preventing the reality or appearance of corruption, even if the limit is not the least restrictive means of addressing those harms. See *id.* at 27 (expressly rejecting least restrictive means analysis); see also *California Med. Ass'n*, 453 U.S. at 199 n.20 (same); cf. *Colorado Republican*, 518 U.S. at 615 (plurality opinion) ("[R]easonable contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors."). Indeed, as long as

some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind. *Compare Kusper v. Pontikes*, 414 U.S. 51 (1973), with *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

424 U.S. at 30 (internal quotation and citation omitted).

Although the *Buckley* Court did not further refine what it meant by “differences in kind,” its citation to *Kusper* and *Rosario* is illuminating. *Kusper* and *Rosario* involved statutes that imposed party registration deadlines for those seeking to vote in a party’s primary election. In *Rosario*, the Court upheld a New York law that prevented a change of party affiliation within 11 months before a primary election. *See* 410 U.S. at 762. In *Kusper*, the Court invalidated an Illinois statute that prohibited voters from switching parties within 23 months before a primary election. *See* 414 U.S. at 61. In invalidating the Illinois statute, the *Kusper* Court distinguished *Rosario* by pointing to the markedly different effects of the two laws: the New York statute allowed a voter to vote in a different party primary every year, *id.* at 60, whereas the Illinois law would force a voter to forgo voting in *any* primary for a period of almost two years in order to switch parties, *id.* at 60-61. Thus, the constitutional difference between the two statutes was not a quantitative difference in the *time* involved, but rather a qualitative difference in the *effect* on First Amendment rights. The New York statute did not altogether preclude voters from associating with the political party of their choice, whereas the Illinois statute did.

The Court’s decision in *Burson* further confirms that a difference in kind is a qualitative difference in the First

Amendment effect of two restrictions. In upholding Tennessee’s 100-foot “campaign-free zone” around polling places as narrowly tailored to serve the compelling state interests in preventing voter intimidation and election fraud, the *Burson* Court commented: “Reducing the boundary to 25 feet, as suggested by the Tennessee Supreme Court . . . is a difference only in degree, not . . . in kind.” 504 U.S. at 210 (citation omitted). According to the *Burson* Court, increasing the size of the buffer zone would create a difference in kind only if it imposed a burden comparable to the absolute ban on vote solicitation in *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating absolute prohibition of election-day newspaper endorsements of candidates). *See* 504 U.S. at 210. *Burson* thus illuminates *Buckley*’s distinction between *Kusper* and *Rosario*: a difference in degree grows to the point where it becomes a difference in kind only when the effect of the challenged law is to foreclose constitutionally protected activity.

This interpretation of *Buckley*’s allusion to “differences in kind” is consistent with the Court’s earlier distinction between contribution limits that impose only marginal restrictions on First Amendment rights and those that severely burden free speech or association. The interpretation is also compatible with the Court’s recent flexible approach to review of electoral regulations. Thus, when a contribution cap has only a limited effect on First Amendment freedoms, “a court has no scalpel to probe” whether the state has perfectly crafted the law, but must instead defer to legislative judgments about precisely where the ceiling should be set. On the other hand, if challengers of a contribution limit demonstrate that it imposes a severe burden on free speech or association, because of dramatic adverse effects on fundraising, the limit is constitutionally “different in kind” from the \$1,000 limit upheld in *Buckley* and is legitimately subjected to stricter scrutiny. *See California ProLife Council PAC*, 989 F. Supp. at 1298 (finding a

difference in kind only after finding that California's limits "will *prevent* the marshaling of assets sufficient to conduct a meaningful campaign") (emphasis added).

This approach would allow courts to guard against "undue hindrances to political conversations and the exchange of ideas," *ACLF*, 119 S. Ct. at 642, without having to micro-manage every jurisdiction's campaign financing system. States and localities would generally remain free to design limits that fit the particularities of their jurisdiction, including, the number of voters, the percentage of the electorate that makes contributions, the role of political parties, the varying media appropriate for different markets, the costs of campaigning in different geographical areas, the number of competitive districts, the economic status of the electorate, the existence or absence of term limits, and so on. Courts would not become involved with those minutiae, as long as the selected limits did not have a "dramatic adverse effect on the funding of campaigns and political associations." *Buckley*, 424 U.S. at 21.

Under this analysis, a quantitative difference in the amount of contribution limits, without more, is of no constitutional significance. A contribution limit that seemed low on its face might well be permissible in a small jurisdiction or in a jurisdiction where a tax credit scheme encouraged large numbers of donors to make small contributions. Moreover, any evaluation of the effect of inflation must take into account not only the demand side of the equation (candidate spending) but also the supply side (contributors' ability to give). The supply side is *positively* affected by inflation, because \$1,000 means less to a contributor in 1999 than it did in 1974.²⁴ A

24. This fact may in part explain why congressional candidate spending more than *quintupled* between 1976 and 1992, see Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to*

constitutionally cognizable "difference in kind" would therefore arise only when a proposed limit had a qualitatively different First Amendment impact. See William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. Rev. 483, 531 (1996) ("Differences in degree may take on constitutional dimension and become differences in kind, but the distinction should not rest on mathematical comparison alone.").

B. Plaintiffs Failed to Carry Their Burden of Proving a Difference in Kind.

Plaintiffs offered no evidence that Missouri's contribution ceilings had a dramatic adverse effect on campaign fundraising. In fact, plaintiffs' affidavits attested to their ability to raise funds under Missouri's limits, once they made an effort to do so. (JA 51, 57-58.)²⁵ The state's evidence further confirmed the possibility of aggregating substantial pools of funds under \$1,000 per election limits. (JA 24-30.) Missouri's limits therefore did not "differ in kind" from the \$1,000 limit upheld in *Buckley* and should not be subject to this Court's "scalpel."

The fact that inflation has eroded the value of \$1,000 since 1976 is therefore of no *constitutional* importance. Federal candidates remain able to raise the funds necessary for effective advocacy under the \$1,000 limit, and Missouri candidates have

Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1132 (1994), notwithstanding the effect of inflation.

25. With the exception of the contributions from SMGPAC (which included a \$250 and a \$500 contribution funneled through the PAC for Fredman, (JA 57-58)), none of the contributions made to Fredman's committee exceeded \$750. See List of Contributions.

been able to do so as well. Candidates might find it easier to raise money in larger increments, but the balancing of fundraising convenience against the potential for real and perceived corruption is a policy judgment that legislatures, not courts, should make — as long as ceilings do not have a severe impact on First Amendment freedoms.²⁶

CONCLUSION

This Court should affirm unequivocally that its flexible First Amendment standard applies in campaign finance cases and hold that Missouri's contribution limits, under that standard, are subject to less than strict scrutiny. In addition, the Court should reaffirm the pragmatic evidentiary burden imposed upon states seeking to establish interests in preventing the reality or appearance of corruption and hold that Missouri has carried that burden in this case — and would do so even under strict scrutiny. The Court should therefore reverse the Eighth Circuit decision below and lift the injunction against Missouri's contribution limits.

26. Indeed, some members of Congress are evidently considering a deal whereby now-unregulated "soft money" contributions to political parties would be banned in exchange for an increase in the federal contribution limit. See *McConnell Hearing Focuses on Hard Money, Fuels Speculation about Reform Compromise*, 39 Money & Politics (BNA) 1 (Mar. 26, 1999). But even if Congress raises the federal limit, the new amount cannot suddenly be regarded as a constitutional minimum. States and localities should still have the "leeway" to adopt lower limits, provided that the caps do not dramatically inhibit the ability of candidates and associations to raise the funds necessary for effective advocacy.

Respectfully submitted,

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IN THE
Supreme Court of the United States

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN, and JOAN BRAY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

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QUESTION PRESENTED

Whether the court of appeals held correctly that Missouri "failed to come forward with evidence" that campaign contributions cause any "real problem."

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Kathleen M. Sullivan, <i>Political Money and Freedom of Speech</i> , 30 U.C. Davis L. Rev. 663 (1997)	41

IN THE
Supreme Court of the United States

No. 98-963

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
v. *Petitioners*,

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN, and JOAN BRAY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENTS
SHRINK MISSOURI GOVERNMENT PAC
AND ZEV DAVID FREDMAN

OPINIONS BELOW

The opinion of the court of appeals is reported at 161 F.3d 519 (8th Cir. 1998). Petitioners' Appendix ("Pet. App.") 1a-19a. The court of appeals' order entering an injunction pending appeal is reported at 151 F.3d 763 (8th Cir. 1998). *Id.* at 20a-23a. The opinion of the district court is reported at 5 F. Supp. 2d 734 (E.D. Mo. 1998). *Id.* at 24a-41a.

JURISDICTION

The court of appeals entered its judgment on November 30, 1998. Jeremiah W. Nixon, Attorney General of Missouri, *et al.*, filed a petition for writ of certiorari on December 11, 1998, and the Court granted that petition

on January 25, 1999.¹ The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The court of appeals held that Missouri's \$275, \$525, and \$1075 limits on campaign contributions violate the First Amendment. It rejected Missouri's contention "that it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." Pet. App. 5a. Instead, the court of appeals "required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* Missouri, however, could not "prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." *Id.* at 6a. Indeed, "the State [was] unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest." *Id.* at 7a.

1. Before 1994, Missouri did not limit either political contributions to state and local candidates or candidates' political expenditures. In 1994, Missouri imposed limits on candidates' campaign expenditures and on political contributions in two sets of amendments to its Campaign Finance Disclosure Law. Mo. Rev. Stat. §§ 130.011 *et seq.* (1994 & Supp. 1998). In July 1994, the Missouri legislature enacted Senate Bill 650, which imposed limits on campaign contributions and expenditures. On November 8, 1994, the Missouri electorate approved Proposition A, a ballot initiative that also established campaign finance regulations and expenditure limits. The Missouri Attorney General ruled that Proposition A, which was to

¹ Joan Bray, an intervenor in the court of appeals, filed a second petition on December 15, 1998. The Court has not acted on that petition.

become effective immediately, superseded Senate Bill 650 to the extent its provisions were more restrictive and that, otherwise, Senate Bill 650 would become effective on January 1, 1995. 94 Mo. Op. Att'y Gen. 218 (Dec. 6, 1994). The Missouri legislature subsequently authorized candidates in the November 1994 elections to establish campaign debt retirement committees and to accept, through December 31, 1996, contributions in unlimited amounts to pay off outstanding obligations. Mo. Rev. Stat. § 130.037 (Supp. 1995); Missouri Ethics Commission, Op. No. 95.08.137 (Sept. 1, 1995).

In 1995, the Court of Appeals for the Eighth Circuit held that certain campaign expenditure limits imposed by Senate Bill 650 and by Proposition A violated the First Amendment.² *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The court of appeals also held that Proposition A's \$100, \$200, and \$300 limits on campaign contributions violated the First Amendment. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The *Carver* court held that Missouri had "no evidence as to why the Proposition A limits of \$100, \$200, and \$300 were selected." 72 F.3d at 642-43. The state had "no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions." *Id.* at 643.

After the invalidation of the contribution limits set by Proposition A, the limits imposed by Senate Bill 650 became effective. Mo. Rev. Stat. § 130.032 (Supp. 1998).

² A district court subsequently held that Missouri's prohibition against campaign contributions during legislative sessions violated the First Amendment because the state had no evidence that this type of political activity caused any "real harm." *Shrink Missouri Government PAC v. Maupin*, 922 F. Supp. 1413, 1418-24 (E.D. Mo. 1996) (*Shrink II*).

Senate Bill 650 originally limited campaign contributions to candidates for office in Missouri on a sliding scale from \$250 to \$500 to \$1000. *Id.* § 130.032.1. It also provided that these contribution limits “shall be increased” to take inflation into account, *id.* § 130.032.2, and, in January 1998, the Missouri Ethics Commission increased the contribution limits. J.A. 37.

Missouri statutes now prohibit contributions of more than \$275 to candidates for state representative or for offices in districts with a population of under 100,000, Mo. Rev. Stat. § 130.032.1(3), (4) (Supp. 1998); contributions of more than \$525 to candidates for state senate or for any office in electoral districts with a population between 100,000 and 250,000, *id.* § 130.032.1(2), (5); and contributions of more than \$1075 to candidates for governor, lieutenant governor, secretary of state, state treasurer, state auditor, and attorney general, as well as to candidates in districts with a population of at least 250,000, *id.* § 130.032.1(1), (6). J.A. 37. Contributors and candidates who violate these limits are subject to criminal penalties and to substantial civil sanctions. *Id.* §§ 130.081, 130.032.7 (1994 & Supp. 1998).

2. On March 2, 1998, Shrink Missouri Government PAC and Zev David Fredman filed a complaint in the United States District Court for the Eastern District of Missouri and challenged the constitutionality of Missouri statutes limiting political contributions to candidates for state and local office. J.A. 1.

a. Shrink Missouri Government PAC (Shrink) is a political action committee organized under the laws of Missouri. *Id.* at 16, 40. It made contributions to candidates for state office in the 1994, 1996, and 1997 elections, and it continues to operate for the purpose of making similar contributions in the future. *Id.* at 9, 16. On June 23, 1997, Shrink made a contribution of \$1025 to “Fredman for Auditor,” a candidate committee, and it

contributed an additional \$50 on February 25, 1998. *Id.* at 9. Shrink believed that Fredman’s candidacy for state auditor would promote its political views and the goals of its contributors. *Id.* at 17. Shrink would have contributed more than \$1075 to “Fredman for Auditor,” as well as more than \$275 and \$525 to other candidates, but for Missouri’s limits on campaign contributions. *Id.* at 9.

These contribution limits severely burdened Shrink’s ability to promote its political views and to express support for candidates through campaign contributions. *Id.* at 17. Fredman needed seed money immediately in order to compete effectively in the Republican primary campaign, and his ability to attract other contributions was a function of his ability to raise seed money. *Id.* The contribution limits were so low that they prevented Fredman from amassing resources necessary for effective political advocacy, and, if Fredman’s primary candidacy failed, Shrink and its contributors would be left without a candidate who would advocate their political views in the November 1998 general election. *Id.* at 10, 17, 40-45.

b. Fredman was a candidate for Missouri Auditor in the 1998 Republican primary. *Id.* at 9. He formed a candidate committee (“Fredman for Auditor”), filed for office, and paid the filing fee. *Id.* at 9, 38. He could not run an effective primary campaign unless his committee could accept immediately contributions in excess of \$1075 from Shrink and other contributors. *Id.* at 10, 12-14. The \$1075 contribution limit was so low that he could not amass the resources necessary to mount an effective campaign, and it severely burdened both his ability to deliver his political message and political dialogue on the issues to be raised in the campaign for state auditor. *Id.* at 10, 12. Fredman decided, as his campaign strategy, to raise a large amount of seed money and to make an appeal to Republican party leaders for support. *Id.* at

12-13. The \$1075 contribution limit imposed a substantial burden on Fredman because he was not a professional politician, and, as a first-time candidate for statewide political office, he did not have either a vast network of political contacts or a well-established base of contributors. *Id.* at 14, 59. Instead, he had to manage his business while mounting a campaign for state auditor. *Id.* at 14. He did not have the time to raise the seed money necessary for his statewide campaign by asking a large number of contributors for small contributions; instead, he had to depend on contributions of more than \$1075 from Shrink and others. *Id.* at 14.

3. On May 12, 1998, the district court, on cross-motions for summary judgment, upheld Missouri's campaign contribution limits. Pet. App. 24a-41a. It found that "[t]he issue is purely legal: do Missouri's limits on campaign contributions violate the first amendment?" and that "regulation of first amendment rights" is subject to "strict scrutiny." *Id.* at 30a. The court did not decide whether Missouri "must demonstrate that campaign contributions in excess of the statutory limits cause some 'real harm,' i.e., that such contributions cause either corruption or the appearance of corruption." *Id.* Instead, the court held that "[i]f a showing of 'real harm' is required (the state claims it is not), . . . defendants here have made that showing." *Id.*

The district court relied on "evidence in the form of an affidavit from the state senator who co-chaired the Interim Joint Committee on Campaign Finance Reform at the time of Senate Bill 650's passage." *Id.* at 31a. This senator, Wayne Goode, stated that the committee "heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence" and "testified to his belief that contributions in excess of the limits set by Missouri 'have the appearance of buying votes as well as the real poten-

tial to buy votes.'" *Id.* (quoting Goode's affidavit) (footnote omitted).

The district court also held that the Missouri contribution limits are "narrowly tailored," *id.* at 35a-37a, and that "the effect of inflation since *Buckley* [*Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)] was decided has not created a 'difference in kind' between a \$1,000 contribution in 1976, and a \$1,075 contribution in 1988 [1998]." *Id.* at 37a (footnote omitted).

4. On July 23, 1998,³ the court of appeals entered an order enjoining enforcement of the campaign contribution limits pending the appeal. Pet. App. 20a-23a. The court of appeals based this order on *Russell v. Burris*, 146 F.3d 563 (8th Cir.), *cert. denied*, 119 S. Ct. 510 (1998), a then very recent June 4, 1998 decision. In *Russell*, the court of appeals had held that Arkansas' \$100 and \$300 limits on campaign contributions violated the First Amendment because the state "did not prove that the perception of corruption . . . was objectively reasonable." 146 F.3d at 569.

In granting the injunction pending appeal, the court of appeals found that "[a]ll campaign contribution limits restrict political speech, and . . . implicate the First Amendment." Pet. App. 22a. It then held that "it seems likely the state has failed in its burden of proof to show 'that there is real or perceived undue influence or corruption attributable to large political contributions . . . and . . . that [the contribution limits] are narrowly tailored to address that reality or perception.'" *Id.* (quoting *Russell v. Burris*, 146 F.3d at 568). The court also held that "it is likely the state has failed to show 'that a rea-

³ The opinion of the court of appeals twice states that the injunction was entered on July 27, 1998. Pet. App. 3a, 4a. In fact, the court of appeals entered its order on July 23rd. J.A. 3. It then amended the order by making a grammatical correction on July 27, 1998.

sonable person could perceive, on the basis of the evidence presented at trial, that such contributions make for undue influence or spawn corruption.’” *Id.* (quoting *Russell v. Burris*, 146 F.3d at 569). The court of appeals then noted that the Missouri campaign contribution limits “are, after adjustment for inflation, dramatically lower than the \$1,000 limit upheld in *Buckley* . . . and do not appear to be narrowly tailored to address any legitimate interest in avoiding corruption or the appearance of corruption.” *Id.*

5. Missouri applied to this Court, on July 30, 1998, for an order staying the injunction pending appeal. J.A. 3. Justice Thomas denied the application on July 31, 1998. *Id.*

6. After the July 23rd Order enjoining enforcement of the contribution limits, W. Bevis Schock, Treasurer of Shrink, worked actively to raise funds for Fredman. *Id.* at 50. He also worked actively to raise funds for Alexander Hasler, a Republican, who, unopposed in the August primary, subsequently became the Republican nominee for State Representative for the 84th District. *Id.* at 50-51. In the November 1998 general election, Hasler challenged a Democrat, the incumbent Representative Joan Bray, who also ran unopposed in the primary and who had intervened as a defendant in this case. *Id.* at 3, 53.

Shrink raised a total of \$1625 between July 23rd and the primary election on August 4, 1998. *Id.* at 50-52, 56-58. Shrink had previously contributed \$1075 to Fredman’s campaign, and, under the shield of the court of appeals’ injunction, it made an additional campaign contribution of \$1250. *Id.* at 9, 51, 57, 58. Shrink’s total contribution to “Fredman for Auditor” in the primary election was \$2325.

Fredman was not able to employ his campaign strategy of seeking large contributions from a small number of contributors “until July 23, 1998, just twelve days before the primary election, when the United States Court of Appeals for the Eighth Circuit enjoined enforcement of the state campaign contribution limits.” *Id.* at 59. Fredman raised a total of \$4750 and spent \$3936. *Id.* at 60. He believed that he was not successful in raising more funds “because many donors, at this late stage, had already decided to support [his] opponent Charles Pierce and because at least some of these donors were concerned about public statements that called into question the effectiveness of [the court of appeals’] July 23, 1998 Order as a shield against enforcement of the state contribution limits.”⁴ *Id.* The St. Louis Post-Dispatch quoted portions of Fredman’s basic campaign statement in its VOTERS’ GUIDE on August 2, 1998, and he had two interviews on the Missouri Network, a statewide group of radio stations. *Id.* Fredman concentrated his efforts on radio advertisements because “the primary [was] only a few days away and [he had] little money.” *Id.* He “ran one spot . . . two times on Friday, July 31, 1998 on the Missouri Network . . . and then again three times on Monday, August 3, 1998 on the same stations.” *Id.* On August 3, 1998, he also ran a second, and different, thirty-second political advertisement a total of sixty-one times on seven radio stations across the state. *Id.* at 61.

After the court of appeals’ July 23rd Order, Shrink also contributed a total of \$325 to Alexander Hasler’s primary election campaign for State Representative for the 84th District. *Id.* at 51. Hasler’s campaign commit-

⁴ Even though Shrink made contributions, and Fredman and Hasler accepted them, under protection of the July 23rd Order, Missouri “declined at oral argument to assure the Court [of Appeals] that no recourse would be taken against those who, like Fredman, accepted contributions in excess of the SB650 limits.” Pet. App. 4a.

tee accepted one contribution of \$275 from Shrink on July 25, 1998, and, in reliance on the court of appeals' July 23rd Order, it also accepted a second contribution of \$50 on that same date. *Id.* at 53-54. Hasler believed that "the court order of July 23 nullifying Missouri's limits on campaign contributions has increased the political dialogue on the issues in the campaign for the State Representative seat for the 84th District" and that he needed "to accept sums larger than \$275.00 per contributor" in order "to mount an effective campaign and match [Bray]," who had "a vast and statewide network of political supporters and contributors." *Id.* at 55. The public record shows that in the general election, Shrink contributed an additional \$500 to Hasler's campaign committee. Shrink Missouri Government PAC, Committee Disclosure Report to the Missouri Ethics Commission (Oct. 7, 1998). Both Shrink's \$325 primary election contribution to Hasler and its \$500 general election contribution exceeded the \$275 statutory limit. Mo. Rev. Stat. § 130.032.1(3) (Supp. 1998); J.A. 37.

Although Fredman lost the Republican primary election for state auditor on August 4, 1998 to Charles Pierce, he received the support of 19.49% of the voters, which was a total of 40,600 votes. Office of the Secretary of State, Official Election Returns, State of Missouri Primary Election, Tuesday, August 4, 1998. Alexander Hasler ran unopposed in the Republican primary for State Representative in District 84, but he lost the general election in November to the incumbent, intervenor Joan Bray, who had run unopposed in the Democratic party primary. Office of the Secretary of State, Official Election Returns, State of Missouri General Election, Tuesday, November 3, 1998 (reporting that Bray received 5,751 votes and that Hasler received 3,289 votes).

7. On November 30, 1998, the court of appeals reversed the judgment of the district court and held that

the Missouri campaign contribution limits violate the First Amendment. Pet. App. 1a-19a.

a. Chief Judge Bowman, joined by Judge Ross, held that the state had not carried its burden of justifying the \$275, \$525, and \$1075 campaign contribution limits. *Id.* at 5a-7a; 9a-10a (Ross, J., concurring).

The court of appeals first rejected Missouri's attempt to "posit[], citing *Buckley*, that corruption and the perception thereof are inherent in political campaigns where large contributions are made" and "that it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." *Id.* at 5a. Instead, the court of appeals "required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* In imposing this burden on Missouri "to prove its compelling interest," the court of appeals expressly invoked the Court's decisions in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (*NTEU*) and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*). *Id.* at 6a n.3.

Missouri, however, could not "prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." *Id.* at 6a. The court of appeals refused to "extrapolate" from examples of corruption noted by the *Buckley* Court "that in Missouri at this time there is corruption or a perception of corruption from 'large' campaign contributions, without some evidence that such problems really exist." *Id.* The court refused to "infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago." *Id.*

The state's evidence—Senator Goode's affidavit—did not fill the evidentiary void. The court of appeals found that this senator “pointed to no evidence that ‘large’ campaign contributions were being made in the days before limits were in place, much less that they resulted in real corruption or the perception thereof.” *Id.* at 6a-7a. Although this senator stated “that he and his colleagues believed there was the ‘real potential to buy votes’ if the limits were not enacted, and that contributions greater than the limits ‘have the appearance of buying votes,’” he “did not state that corruption then existed in the system.” *Id.* at 7a (quoting Goode's affidavit). Moreover, there was no way for the court of appeals to determine “whether this single legislator's perception of corruption is the ‘public perception,’ whether it is objectively ‘reasonable,’ and whether it ‘derived from the magnitude of . . . contributions’ that historically have been made to candidates running for public office in Missouri.” *Id.* (quoting *Russell v. Burris*, 146 F.3d at 569).

In short, Missouri “failed to come forward with evidence to prove a compelling interest that would be served by the restrictions SB650 imposes on campaign contributions.” *Id.* In fact, “the State [was] unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest.” *Id.*

b. Chief Judge Bowman, writing separately,⁵ also determined that the \$275, \$525, and \$1075 contribution limits are not “narrowly tailored” because they “are so small that they run afoul of the Constitution by unnecessarily

⁵ Judge Ross agreed with Chief Judge Bowman “that the State failed to satisfy its evidentiary burden.” Pet. App. 9a-10a (Ross, J., concurring). On the basis of “the reasons stated by Judge Gibson [in dissent],” he did “not join in part III B of Judge Bowman's opinion finding that the contribution limits are different in kind from those approved in *Buckley*.” *Id.* at 10a.

restricting protected First Amendment freedoms.” *Id.* at 7a, 8a. The Chief Judge found that “[a]fter inflation, limits of \$1,075, \$525, and \$275 cannot compare with the \$1,000 limit approved in *Buckley* twenty-two years ago.” *Id.* at 8a (footnote omitted). Noting the contention that “\$1,075 in 1976 dollars is the equivalent of just \$378 in purchasing power today,” ⁶ *id.* at 8a n.4, Chief Judge Bowman found that “[i]n today's dollars, the SB650 limits appear likely to ‘have a severe impact on political dialogue’ by preventing many candidates for public office ‘from amassing the resources necessary for effective advocacy.’” *Id.* at 8a (quoting *Buckley*, 424 U.S. at 21). Thus, “absent the State's having proven the actual necessity for such a heavy-handed restriction of protected speech,” the \$275, \$525, and \$1075 contribution limits were “too low to allow meaningful participation in protected political speech and association” and were “not narrowly tailored to serve the alleged interest.” *Id.* (internal quotation marks and citation omitted).

The Chief Judge specifically disclaimed any attempt to “‘fine tun[e]’ the work of the Missouri legislature” or to exercise “authority that is not ours.” *Id.* (quoting *Buckley*, 424 U.S. at 30). He concluded that “the difference between these limits of \$1,075, \$525, and \$275, and larger dollar limits that might be constitutionally sound . . . are not ‘distinctions in degree’ but ‘differences in kind.’” *Id.* at 8a-9a (quoting *Buckley*, 424 U.S. at 30). He “remind[ed] the State that it has the burden of showing that any limits it places on campaign contributions are narrowly tailored to serve the State's compelling in-

⁶ Chief Judge Bowman rejected Missouri's contention that the Consumer Price Index (CPI) should not be used “to calculate the effects of inflation on dollars spent for campaign contributions” and noted that the state itself uses the CPI to account for the effects of inflation after the date (1994) when the contribution limits were enacted. Pet. App. 8a n.4 (citing Mo. Rev. Stat. § 130.032.2 (Supp. 1997)).

terest in addressing proven 'real or perceived undue influence or corruption attributable to large political contributions.' " *Id.* at 9a (quoting *Russell v. Burris*, 146 F.3d at 568). Any "problem of judicial line-drawing can be expected largely to disappear" if "those who would regulate and limit constitutionally protected political speech satisfy their heavy burden of proof." *Id.*

c. Judge Gibson, in dissent, would have upheld Missouri's \$275, \$525, and \$1075 contribution limits because he "[could] not distinguish *Buckley*." *Id.* at 10a.

Judge Gibson found that there was no "difference in kind" between Missouri's \$1075 limit and the "\$1,000 [limit] upheld by *Buckley*." *Id.* at 11a. He rejected Chief Judge Bowman's "argument . . . that inflation has dissipated the similarity between the limits in this case and those approved in *Buckley*"; in his view, "[i]nflation has not undermined *Buckley*'s precedential weight or modified its holding." *Id.* at 13a.

Judge Gibson also concluded that "the State has adequately justified the contribution limits at issue." *Id.* at 14a; see *id.* at 14a-18a. Missouri, "by the Goode affidavit, [had] demonstrated . . . the dangers posed by unlimited campaign contributions." *Id.* at 17a. Judge Gibson could not "reconcile the short shrift given the Goode affidavit . . . with the Supreme Court's approach in *Buckley*, which cited no actual evidence that large contributions might give rise to the appearance of political corruption and which deferred to what Congress could have reasonably concluded." *Id.* (footnote omitted).

SUMMARY OF ARGUMENT

The court of appeals held correctly that Missouri's \$1075 limit on campaign contributions violates the First Amendment. This judgment rests on the simple, but fundamental proposition that conjectural harms do not justify

restrictions on speech and on the state's failure to "come forward with evidence" that campaign contributions cause any "real problem." Pet. App. 6a, 7a.

Missouri contends that "it is unnecessary" under *Buckley* "to demonstrate that [corruption and the appearance of corruption] are actual problems in Missouri's electoral system." *Id.* at 5a. Corruption and the appearance of corruption, however, are not a talisman that the state can invoke to dispel the First Amendment. Limits on campaign contributions "implicate fundamental First Amendment interests," *Buckley*, 424 U.S. at 23, and the state has the burden of justifying limits on speech. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). To carry its burden, the state must prove that the harms that it recites are "real, not merely conjectural" and that, at a minimum, the regulation "will in fact alleviate these harms in a direct and material way." See *NTEU*, 513 U.S. at 475 (quoting *Turner I*, 512 U.S. at 664 (plurality opinion of Kennedy, J.)) (internal quotation marks omitted). Thus, just as this Court has required proof that regulations of commercial speech, *Edenfield*, 507 U.S. 761, of government employees' speech, *NTEU*, 513 U.S. 454, of cable television programming, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*), and of independent expenditures by political parties, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), address a "real harm," the court of appeals required Missouri to demonstrate "that there were genuine problems that resulted from contributions in amounts greater than the limits in place." Pet. App. 5a.

Missouri, however, did not "adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest" in preventing corruption or the appearance of corruption. *Id.* at 7a. The state does not argue that there is actual corruption attributable to campaign contributions; it presented no evi-

dence that “[e]lected officials [have ever been] influenced to act contrary to their obligations of office by . . . infusions of money into their campaigns.” *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) (*NCPAC*). Missouri, instead, would limit campaign contributions solely on the basis of “the appearance of corruption that arises from a regime of large campaign contributions.” Pet. Br. 26.

The state’s only evidence of any appearance of corruption, however, is one state legislator’s belief that “contributions over [the Missouri] limits have the appearance of buying votes.” J.A. 47. An appearance of corruption—which may arise whenever a legislator votes or takes actions that are consistent with the positions of contributors—may be “unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.” *McCormick v. United States*, 500 U.S. 257, 272 (1991). Given the problems inherent in the amorphous concept of an appearance of corruption, the court of appeals correctly rejected the legislator’s recollections about the enactment of the contribution limit because there was no way to determine “whether [his] perception of corruption is the ‘public perception,’ whether it is objectively ‘reasonable,’ and whether it ‘derived from the magnitude of . . . contributions’ that historically have been made to candidates running for public office in Missouri.” Pet. App. 7a (quoting *Russell v. Burris*, 146 F.3d at 569).

Instead of trying to fill the evidentiary void, Missouri asks the Court to take “judicial notice” of the appearance of corruption and to accept its “common sense” proposition that “the public believes that recipients of large contributions are beholden to their paymasters.” Pet. Br. 33, 36. Any public perception of corruption, however, is most probably mistaken: “campaign contributions are made to support politicians with the ‘right’ beliefs . . .

[not to] buy politicians’ votes.” Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How A Politician Votes? Or, Do Donors Support Candidates Who Value The Same Things That They Do?*, 40 J. L. & Econ. 317, 346 (1997).

Missouri’s argument boils down to the assertion that its purpose is benign and that restrictions on First Amendment interests should be dismissed as “modest.” See Pet. Br. 10-13. As the court of appeals found, however, the burdens on First Amendment interests are far from modest. Pet. App. 4a, 22a-23a. The purpose of the contribution limit, moreover, is both less clear and more complex than the state suggests. If, for example, “common sense” suggests a public perception of corruption, “common sense” also suggests that legislators, acting on the basis of self-interest, would establish a system of contribution limits, like Missouri’s, that favors incumbents and members of major parties. Similarly, given Missouri’s concern that \$1000 contributions are a high percentage of the average American household’s disposable income, the contribution limit may well be more a response to perceptions of economic inequality than to perceptions of corruption. Pet. Br. 42; see *Buckley*, 424 U.S. at 48-49 (the state cannot “restrict the speech of some elements of our society in order to enhance the relative voice of others”).

In a different case where a state, unlike Missouri, had some evidence that a particular campaign finance practice caused some real harm, difficult questions about the appropriate degree of deference to legislative judgments might arise. In this case, however, there is no basis for finding, even under a low level of scrutiny, that the state has “drawn reasonable inferences based on substantial evidence.” *Turner II*, 520 U.S. at 195 (quoting *Turner I*, 512 U.S. at 666 (plurality opinion of Kennedy, J.)) (internal quotation marks omitted). Missouri “failed to come forward with evidence” of any “real problem”; it was

"unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest." Pet. App., 6a, 7a.

ARGUMENT

I. MISSOURI MUST DEMONSTRATE THAT THE HARMS IT RECITES, CORRUPTION AND THE APPEARANCE OF CORRUPTION, ARE "REAL, NOT MERELY CONJECTURAL"

The court of appeals correctly rejected Missouri's contention that, under *Buckley*, "it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." Pet. App. 5a. Although *Buckley* upheld a \$1000 limit on campaign contributions to candidates for federal office, Missouri's simplistic analogy between that federal limit and its \$1075 limit does not end all First Amendment analysis. The Court, in a long line of post-*Buckley* cases, has held consistently that in order to defend a regulation of speech, government must offer more "than mere speculation about serious harms." *NTEU*, 513 U.S. at 475. Government, instead, "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* (internal quotation marks and citation omitted).

A. The State Has The Burden Of Justifying Limits On Political Speech

In an effort to avoid its duty to demonstrate that corruption or the appearance of corruption are "actual problems in Missouri's electoral system" (Pet. App. 5a), Missouri asserts that the "burden of proof is squarely on those who seek to invalidate a contribution limit." Pet. Br. 13. The state's argument stands the First Amendment on its head. Campaign contribution limits, and other restrictions on political speech, are not presumptively

valid. The rule in our constitutional system is that "limits on political activity [are] contrary to the First Amendment." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97 (1981). Although *Buckley* recognized "a single narrow exception" to this rule, *Citizens Against Rent Control*, 454 U.S. at 297, the Court imposed the burden of justification on the government. 424 U.S. at 25 (contribution limits "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms").

Missouri is wrong. Shrink and Fredman have no duty to show that the campaign contribution limit "cripples or negates" their interests in political speech. Pet. Br. 40, 41, 43. The state has the burden of justifying limits on First Amendment interests. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). It is, for example, well-settled that "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *E.g., Edenfield*, 507 U.S. at 770 (internal quotation marks and citation omitted). Missouri has not identified any reason why it should not shoulder the same burden of justifying limits on political speech.

B. The State Is Not Excused From Justifying Limits On Political Speech Under Its Novel "Undue Burden" Standard

Missouri claims that *Buckley* establishes a balancing test, Pet. Br. 14, 24, 25, and that campaign contribution limits are valid unless contributors and candidates can show that these limits "unduly burden" their First Amendment interests. *Id.* at 18, 37. It then concludes that the \$1075 limit is valid because it allegedly imposes only "modest burdens" on First Amendment rights. *Id.* at 25-26. Like the attempt to shift the burden of justification, the other components of Missouri's proposed "undue burden" standard are mistaken: *Buckley* does not estab-

lish a balancing test, and the contribution limit in fact imposes substantial burdens on fundamental First Amendment interests.

1. *Buckley Did Not Establish a Balancing Test*

Missouri misreads *Buckley* and misstates the level of judicial scrutiny appropriate for limits on campaign contributions. *Buckley* held that both “contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities”—“[d]iscussion of public issues and debate on the qualifications of candidates”—and that “[t]he First Amendment affords the broadest protection to such political expression.” 424 U.S. at 14. Although *Buckley* also distinguished contribution and expenditure limits and held that expenditure limits impose “significantly more severe restrictions” than contribution limits, it did not apply a balancing test to contribution limits or adopt any “undue burden” standard. *Id.* at 23; *see id.* at 14-38. The Court in fact held that contribution limits are subject to a “rigorous standard of review.”⁷ *Id.* at 29.

There is, at bottom, little purpose to Missouri’s argument that the court of appeals erred in applying strict scrutiny and to the state’s attempt to substitute its novel

⁷ Missouri and the government would lower the level of scrutiny applicable to campaign contribution limits by reading *Buckley* through the lens of the Court’s ballot access cases. Pet. Br. 23 n.17; U.S. Br. 26-27. The purported analogy to ballot access cases, like *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), however, is not well-taken. Campaign contribution limits implicate “fundamental First Amendment interests,” *Buckley*, 424 U.S. at 23, but regulation of the “mechanics of the electoral process” does not affect the core political activity protected by the First Amendment. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345-46 (1995). Moreover, state regulation of campaign contributions, like public financing of Presidential elections, “lacks the same sort of mandate of necessity as does a State’s regulation of ballot access.” *Buckley*, 424 U.S. at 293 (Rehnquist, J., concurring in part and dissenting in part).

“undue burden” standard. Under any level of scrutiny appropriate for restrictions on “fundamental First Amendment interests,” *Buckley*, 424 U.S. at 23, a state, as the court of appeals held, must have some evidence of “real harm.” Even under Missouri’s balancing test, some evidence of “real harm”—some evidence of corruption or of the appearance of corruption—would still be necessary or else the state’s entirely speculative interest would easily be outweighed by First Amendment interests.

2. *Missouri’s Campaign Contribution Limit Imposes Substantial Burdens On Contributors and Candidates*

The court of appeals held that Missouri “cannot make a persuasive argument that SMG [Shrink] and Fredman are not and have not been harmed by the limits imposed on campaign contributions.”⁸ Pet. App. 4a. It found, before enjoining enforcement of the contribution limit on July 23, 1998, that Shrink had made, and Fredman had accepted, the maximum \$1075 contribution permitted by Missouri law. Pet. App. 23a. The contribution limit “restrict[ed] SMG in the promotion of its political viewpoints and in its expression of support for candidates who share its political goals.” *Id.* It “restrict[ed] Fredman from garnering the sums necessary to promote his campaign for state auditor and to deliver his political message.” *Id.*

Moreover, in the short twelve-day period after the court of appeals enjoined enforcement of the contribution limit and before the August 4th primary election, Shrink contributed, and Fredman accepted, an additional \$1250. J.A. 51, 57, 58. Fredman used these additional funds to wage a vigorous campaign, and he obtained the

⁸ Missouri asserts that the court of appeals “rejected” Fredman’s claim that he was harmed by the contribution limit. Pet. Br. 22, n.16. This unsupported assertion is at odds with the court of appeals’ holding.

support of approximately twenty percent of the voters and more than 40,000 votes. *Id.* at 59-62. Fredman's campaign promoted the free speech goals of the First Amendment: his opponent in the Republican primary reportedly increased his advertising "out of concern about Fredman." Appellants' Reply Br. (Aug. 10, 1998) App. 26.

Ignoring the effects of the contribution limits on Shrink and Fredman, Missouri argues that the contribution limit has only a "negligible" effect because Shrink and Fredman did not show that the contribution limit has an adverse effect on other contributors and candidates.⁹ Pet. Br. 18. More particularly, Missouri, again attempting to avoid its burden of justification, argues that Shrink and Fredman cannot prove that the contribution limit "unduly burdens" their First Amendment rights because it "affect[s] only a minuscule number of Missouri" contributors and does "not prevent[] Missouri candidates from amassing the funds necessary for political advocacy." *Id.* at 20; *see id.* at 18-21. Missouri's argument, however, just like its claim that *Buckley* establishes a balancing test, is mistaken. The mere fact that some contributors and candidates may not be affected adversely by the Missouri contribution limit does not negate the fact that the contribution limit has a dramatic, severe effect on other contributors, like Shrink, and candidates, like Fredman.

Missouri, for example, examines two elections held before limits on campaign contributions were imposed in

⁹ Missouri claims that Fredman was not, in its word, a "viable" candidate because he did not choose to raise funds in small amounts and that his "procrastination" caused his injury. Pet. Br. 22 n.16. Respondent Bray also disparages Fredman's candidacy and Shrink's small financial resources. Resp. Bray Br. 8, 25-26. Shrink and Fredman explained their campaign and financial strategies in detail, J.A. 12-14, 16-17, 38-39, 40-45, 50-52, 56-58, 59-62, and the court of appeals correctly rejected all assertions that their injuries were contrived or conjectural. Pet. App. 4a.

1994 and argues that only a small percentage of contributors ("2.38%" and "1.49%") in these elections made contributions that would have been barred by the \$1075 contribution limit. *Id.* at 18-20. Far from illustrating the allegedly "modest" effects of the contribution limit, Missouri's argument demonstrates a fundamental First Amendment problem—contribution limits favor particular types of candidates. As the intervenor, incumbent State Representative Bray, candidly admitted: "for every plaintiff Fredman who may be harmed if the contribution limits are upheld, there is another candidate who may be harmed if the limits are invalidated."¹⁰ Memorandum of Law In Support Of Motion To Intervene 5-6 (May 1, 1998). Some candidates, like Fredman's opponent in the August 1998 primary election, do not have to rely on individual contributions of \$1075 or less because they have the support of a political party.¹¹ Other candidates, like Fredman,

¹⁰ Representative Bray's counsel explained that she has competed successfully under Missouri's regime of contribution limits and that she might not be able to retain her public office in a regime permitting larger or unlimited contributions. *See* Memorandum of Law in Support of Motion to Intervene 5-6 (May 1, 1998).

¹¹ Fredman's opponent in the Republican primary, Charles Pierce, had the party's favor. *See* J.A. 13-14, 43-44. State law provides that each political party shall have a state committee, congressional district committees, judicial district committees, state senatorial district committees, legislative district committees, and county committees. Mo. Rev. Stat. § 115.603 (1994). Each of these committees can establish a "political party committee," *id.* §§ 130.011(24), (25) (Supp. 1998), and in 1998, each "political party committee" could contribute \$10,750 to a candidate for statewide office, like state auditor, in a contested primary election. *Id.* § 130.032.4; *see Missouri Republican Party v. Lamb*, 31 F. Supp. 2d 1161, 1162 (E.D. Mo. 1999) (the \$10,000 statutory limit on contributions made by a "political party committee" has been adjusted to \$10,750 to account for inflation). Thus, Fredman's opponent could have accepted contributions up to \$10,750 from numerous committees of the Republican Party, as well as individual contributions, but Fredman, the outsider, was restricted to contributions of \$1075 or less.

who are less well-established than incumbents like Bray, or who are not the nominee of a major party, need campaign contributions of more than \$1075 as seed money and are dependent on the contributions prohibited by the Missouri statute.¹²

Missouri's only other argument—that the amounts spent in 1996 elections, after enactment of contribution limits, and in 1992 elections, before adoption of contribution limits, were similar or higher—also falls far short of proving the state's contention that the contribution limit imposes only “modest” burdens. Pet. Br. at 20-21. The pattern of spending in the 1992 and 1996 elections discussed by the state may suggest, for example, only that some candidates were particularly successful in raising funds in 1996 from other unregulated or less restricted sources. In fact, it was widely reported that contributions to political parties in the 1996 elections were used as a device to circumvent the limits on individual campaign contributions. Pl. Mem. In Support Of Motion For Summary Judgment (Apr. 13, 1998) (Exh. B—Jo Mannies, *Laws Shift Flow Of Money To Political Parties*, St. Louis Post-Dispatch, Aug. 1, 1996, at 5B). Moreover, whatever the effect of the contribution limit may have been

¹² Fredman had a “special opportunity to participate successfully in the Republican primary for state auditor” after the incumbent, a fellow Republican, decided not to run for re-election and after another prominent Republican decided not to participate in the primary. J.A. 12-13. Fredman's “window of opportunity,” however, was “small” because the incumbent Republican auditor was in the process of anointing her successor. *Id.* at 13. He needed “a large amount of seed money immediately” in order to take advantage of this “special opportunity.” *Id.* at 13-14. *Buckley* noted claims about the importance of seed money, but it left open the question of the effects of the \$1000 contribution limit on efforts to “launch campaigns.” 424 U.S. at 34 n.40; *see id.* at 242 n.5 (“‘seed money’ can be essential, and the inability to obtain it may effectively end some candidacies before they begin”) (Burger, C.J., concurring in part and dissenting in part).

on some candidates and contributors in 1996, there is no question, as the court of appeals found, that it harmed both Shrink and Fredman in the 1998 Republican primary election.

C. The State Must Have Substantial Evidence Of “Real Harm”

Buckley, of course, is the *alpha* of First Amendment analysis of Missouri's campaign contribution limit. It is not, however, the *omega*. It is now settled that government must have substantial evidence of real harm to regulate speech.

Buckley defined a “large” political contribution in terms of its capacity to create corruption or the appearance of corruption, and it upheld the national government's power to limit “large” political contributions that caused either corruption or the appearance of corruption. 424 U.S. at 26, 28. *Buckley* did not hold that all campaign contributions create a risk of corruption. Instead, the Court recognized that “the integrity of our system of representative democracy is undermined” by “large contributions . . . given to secure a political *quid pro quo* from current and potential office holders.” *Id.* at 26-27 (emphasis added). As the Court noted subsequently, all limits on campaign contributions, regardless of amount, are not *per se* constitutional: “*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment” and that “exception relates to the perception of undue influence of large contributors to a candidate.” *Citizens Against Rent Control*, 454 U.S. at 296-97 (emphasis added).

To come within the “single narrow exception” recognized in *Buckley*, a state must show that the prohibited contributions are “large” in the sense of causing corruption or the appearance of corruption. Missouri's reliance on *Buckley* for the proposition that it does not have to

demonstrate that these harms are real is misplaced. *Buckley*, as Missouri argues, may have upheld a particular contribution limit—a \$1000 limit on individual contributions to candidates in federal elections—on the basis of relatively little evidence that campaign contributions caused corruption or the appearance of corruption. See Pet. Br. 29-30. The Court, however, has supplemented *Buckley* over the next twenty-three years with a requirement that

[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

NTEU, 513 U.S. at 475 (internal quotation marks and citation omitted).

1. Evidence Of "Real Harm" In Campaign Finance Cases: *Buckley To Colorado Republican*

Buckley, as Missouri argues (Pet. Br. 30), proceeded largely on the premise that corruption is "inherent in a system permitting unlimited financial contributions." 424 U.S. at 28. The Court's deference to Congress' judgment about the need for contribution ceilings, however, is easily overstated.¹³ *Buckley* in fact noted that "the deeply disturbing examples [of large contributions given to secure a political *quid pro quo*] surfacing after the 1972 election demonstrate that the problem is not an illusory one," and it cited the court of appeals' opinion, which had "discussed a number of the abuses uncovered after the 1972

¹³ *Buckley* showed little deference to Congress' judgments about the need for expenditure limits. The Court, for example, rejected Congress' judgment about the potential for corruption inherent in independent expenditures. See 424 U.S. at 45-48.

elections." *Id.* at 26-27 & n.28. The court of appeals had found that "[t]he record before Congress was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions."¹⁴ *Buckley v. Valeo*, 519 F.2d 821, 839 n.37 (D.C. Cir. 1975) (per curiam).

Although one early post-*Buckley* decision deferred broadly to Congress, other more recent cases have rejected reliance on speculation or a mere "hypothetical possibility" of problems. Compare *FEC v. National Right to Work Committee*, 459 U.S. 197, 210 (1982) (refusing to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared") with *NCPAC*, 470 U.S. at 498-500 (finding that a "hypothetical possibility" of an exchange of political favors for uncoordinated expenditures was not enough to justify an expenditure limit). Indeed, the Court, in its most recent campaign finance decision, invoked and applied the same "real harm" standard as the court of appeals. *Colorado Republican*, 518 U.S. 604; see *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S. Ct. 636, 651 (1999) (Thomas, J., concurring in the judgment) (noting that "the State ha[d] failed to satisfy its burden of demonstrating that fraud is a real, rather than a conjectural, problem").

In *Colorado Republican*, the Court held that limits on "independent" expenditures by political parties in national elections violate the First Amendment. The Court, however, did more than simply reaffirm and apply *Buck-*

¹⁴ The court of appeals had also noted a contribution of two million dollars from the dairy industry to President Nixon's 1972 re-election campaign, contributions of three million dollars from persons seeking ambassadorial appointments, and a contribution of \$100,000 from an ambassador seeking a more prestigious posting. 519 F.2d at 839-40 & nn.36-38.

ley's holding that limits on an individual's "independent" expenditures are unconstitutional, 424 U.S. at 39-51; it looked for some demonstration that independent expenditures by political parties cause some harm or problem. Six members of the Court invoked Justice Kennedy's plurality statement in *Turner I* of the government's duty to demonstrate that regulations of speech address a real harm. *Colorado Republican*, 518 U.S. at 618 (opinion of Breyer, J.) (quoting *Turner I*, 512 U.S. at 664); *id.* at 647 (opinion of Thomas, J.) (same).

Neither Congress, nor the government's lawyers at trial, however, had any evidence that independent expenditures by political parties caused any problem of corruption. *Id.* at 618 (opinion of Breyer, J.) ("[t]he Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures"); *id.* at 647 (opinion of Thomas, J.) ("the Government . . . has identified no more proof of the corrupting dangers of coordinated expenditures than it has of independent expenditures"). Thus, *Colorado Republican* confirms the court of appeals' decision to require Missouri to demonstrate that contribution limits address a "real harm."¹⁵ Pet. App. 6a n.3.

2. Evidence Of "Real Harm": A Prerequisite To Regulation Of Commercial Speech

Colorado Republican does not stand alone. The Court has held consistently that a state cannot carry its burden

¹⁵ Although the government notes correctly that *Colorado Republican* continues to distinguish expenditures and contributions, it ignores the fact that six members of the Court invoked and applied the real harm standard. See U.S. Br. 24-25. Any suggestion that the *Colorado Republican* "real harm" requirement applies only to laws restricting expenditures, as opposed to laws limiting contributions, would seem to be misplaced. The real harm standard also applies to commercial speech regulations that, unlike limits on campaign contributions and expenditures, do not "implicate fundamental First Amendment interests." *Buckley*, 424 U.S. at 23.

of justifying a restriction on commercial speech "by mere speculation or conjecture"; a state "must demonstrate that the harms it recites are real." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 770-71) (internal quotation marks omitted); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 143 (1994) (same); *Edenfield v. Fane*, 507 U.S. at 770-71.

For example, in *Edenfield*, the Court held that a state Board of Accountancy's regulation barring in-person solicitation by certified public accountants violated the First Amendment where the only evidence of any harm was an affidavit (submitted by a former chairman of the state board) "contain[ing] nothing more than a series of conclusory statements." 507 U.S. at 771; see *id.* at 764. Similarly, in *Zauderer v. Office of Disciplinary Counsel*, the Court rejected a state's argument that a ban on illustrations in attorney advertisements could be justified by abstract claims that the public would be misled, manipulated, or confused. 471 U.S. 626, 647-49 (1985). The Court found that "the State's arguments amount[ed] to little more than unsupported assertions," and the state had failed to offer "any evidence or authority of any kind" to support its contentions. *Id.* at 648.

3. Evidence Of "Real Harm": A Key Component Of Intermediate Scrutiny

The "real harm" standard, which the Court applies in commercial speech cases, is also a key component of intermediate scrutiny in other contexts. The Court has held that regulation of government employees' nonpolitical speech requires "a justification far stronger than mere speculation about serious harms." *NTEU*, 513 U.S. at 475. The Court has also given particularly close consideration to the real harm standard in two recent decisions

addressing certain “must-carry” provisions of a federal statute requiring cable television systems to dedicate some of their channels to local broadcast stations. *Turner II*, 520 U.S. 180; *Turner I*, 512 U.S. 622.

In *National Treasury Employees Union*, the Court found that the government’s interest “that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities” was “undeniably powerful.” 513 U.S. at 472. Nonetheless, a prohibition against federal employees accepting honoraria for making appearances, giving speeches, or writing articles violated the First Amendment: the government could not demonstrate that the acceptance of honoraria by low-level federal employees caused any real harm.

The government had “no evidence of misconduct related to honoraria in the vast rank and file of [low-level] federal employees,” and it had only “limited evidence of actual or apparent impropriety by legislators and high-level executives.” *Id.* at 472. Congress did not have any evidence that acceptance of honoraria by low-level federal employees was a problem.¹⁶ *Id.* at 485 (O’Connor, J., concurring in the judgment in part and dissenting in part) (no “showing that Congress considered empirical or anecdotal data pertaining to abuses by lower echelon Executive Branch employees”). The government’s lawyers had cited an official 1992 report, made three years after the ban on honoraria was imposed, but the Court found that “[i]ts 112 pages contain not one mention of

¹⁶ Although the Court commented that Congress could assume that payments of honoraria to “judges or high-ranking officials in the Executive Branch” might generate an appearance of corruption, the comment was not necessary to the decision of the case, which involved only low-level federal employees. 513 U.S. at 473, 477-80.

any real or apparent impropriety related to a lower level employee.” *Id.* at 472 n.18. The Court refused to defer to the government’s speculation about the problems caused by payment of honoraria to low-level federal employees. *Id.* at 467 n.11; see *id.* at 475-76 n.21.

In the first of the two cable television cases, the Court held that the “must-carry” provisions were subject to intermediate scrutiny under the First Amendment.¹⁷ *Turner I*, 512 U.S. at 662. A plurality, invoking the Court’s *Edenfield* statement of the “real harm” test, determined that the government must “demonstrate” both that the harms that the statute recited were “real, not merely conjectural” and that the regulation would “in fact alleviate these harms in a direct and material way.” *Id.* at 664. After a remand to develop the record, the Court held that the must-carry provisions did not violate the First Amendment. *Turner II*, 520 U.S. 180.

Although the Court was divided, there appears to be broad agreement on two fundamental points. First, the Court agreed that the government, under an intermediate standard of review, had a duty to demonstrate both that the must-carry provisions addressed a “real harm” and that the regulations would alleviate the harms in a material way. Compare *id.* at 195 (“[t]he expanded record now permits us to consider whether the must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way”) with *id.* at 258 (O’Connor, J., dissenting) (“impossible to discern whether Congress was addressing a problem that is ‘real, not merely conjectural,’ and whether must-carry addresses the problem in a ‘direct and material way’”) (quoting *Turner I*, 512 U.S. at 664 (plurality

¹⁷ Four members of the Court would have applied strict scrutiny. *Turner I*, 512 U.S. at 675-82 (O’Connor, J., concurring in part and dissenting in part); see *Turner II*, 520 U.S. at 230-35 (O’Connor, J., dissenting).

opinion)). Second, the Court recognized that careful review of the evidence was necessary to implement this standard. *Compare id.* at 196-221 (reviewing the evidence before Congress and the evidence developed at trial) *with id.* at 236-52 (same).

The Court was divided on the question whether the government had substantial evidence to support Congress' determinations. This division, in turn, rested on a disagreement about the degree of deference to be accorded to Congress. On the one hand, the majority, recognizing that courts must "accord substantial deference to the predictive judgments of Congress," held that "its sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 195 (internal quotation marks and citations omitted). On the other hand, four members of the Court, while recognizing that the Court "owe[s] deference to Congress' predictive judgments," argued that the Court has "an independent duty to identify with care the Government interests supporting the scheme, to inquire into the reasonableness of congressional findings regarding its necessity, and to examine the fit between its goals and its consequences." *Id.* at 229 (O'Connor, J., dissenting). In their view, the majority had given too much deference to Congress.¹⁸ *Id.* at 258 (O'Connor, J., dis-

¹⁸ The majority's statement of the deference to be accorded to Congress appears to be limited to its context—intermediate scrutiny of content-neutral speech regulations. *See* 520 U.S. at 225 (Stevens, J., concurring) ("[i]f [the] statute regulated the content of speech rather than the structure of the market, our task would be quite different"). Otherwise, it appears to be well-settled that the Court must exercise independent judgment to protect First Amendment rights. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 875-76 (1997); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

senting) (criticizing the principal opinion for "a willingness to substitute untested assumptions for evidence").

* * * *

The government argues that the Court would have to "overrule *Buckley's* analysis of contribution limits" in order to uphold the court of appeals' ruling. U.S. Br. 10. This argument, however, is mistaken. Far from overruling *Buckley*, it is necessary to recognize only that subsequent cases have supplemented *Buckley* and imposed a duty to demonstrate that speech regulations, including campaign finance regulations, address some real harm. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 531 (1996) (O'Connor, J., concurring in the judgment) (noting that the Court's deference to legislative presumptions in one case had been qualified by decisions in five subsequent cases that "declined to accept at face value the proffered justification for the State's regulation").

II. MISSOURI HAS NOT SHOWN THAT CAMPAIGN CONTRIBUTIONS CAUSE ANY "REAL HARM"

The court of appeals correctly held that Missouri "failed to come forward with evidence to prove a compelling interest that would be served by the restrictions SB650 imposes on campaign contributions" and that "the State [was] unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest [in avoiding corruption and the appearance of corruption]." Pet. App. 7a. The legislature in 1994 did little more than copy the \$1000 campaign contribution limit upheld by *Buckley* eighteen years earlier. The state's only evidence—a state senator's unsupported, conclusory statements—falls far short of the showing of real harm required to sustain regulation of either commercial speech or programming on cable television systems. *Edenfield*, 507 U.S. 761; *Turner II*, 520 U.S. 180.

A judicial determination that the state, at a minimum, has “drawn reasonable inferences based on substantial evidence” is necessary to protect the “fundamental First Amendment interests” that are implicated by contribution limits. *Turner II*, 520 U.S. at 195 (internal quotation marks and citation omitted); *Buckley*, 424 U.S. at 23. The court of appeals’ requirement that the state must have some evidence of a “real problem”—and more particularly, some “objectively reasonable” evidence of an appearance of corruption—guards against the risk that the purpose or effect of the contribution limit is to redress perceptions of economic inequality or to protect incumbents.

A. The State Has No “Objectively Reasonable” Evidence Of Any Appearance Of Corruption

Missouri does not argue that it has any problem with, much less any evidence of, actual corruption caused by campaign contributions. See Pet. Br. 26. Absent any evidence connecting corruption to campaign contributions, it is hard to understand how any reasonable perception of corruption can arise.¹⁹ The state, nonetheless, invokes general dissatisfaction with politics and politicians, headlines that “reveal . . . a widespread perception of abuse and corruption in campaign financing,” and undifferentiated fears that “money is harmfully distorting the nation’s political process.”²⁰ *Id.* at 2. It then argues that “a ‘re-

¹⁹ In *Buckley*, Congress in fact had some evidence of corruption from which a perception of corruption could arise. See note 14 *supra* and accompanying text.

²⁰ If there is a widespread perception of corruption, it is probably more a function of very large, unregulated “soft-money” contributions made to political parties than of much smaller \$1000 or \$1075 contributions made directly to federal or Missouri candidates. See Common Cause Br. 11-13 (\$300,000 and \$1,000,000 contributions to political parties). Missouri and the *amici* do not offer any examples of \$1000 or \$1075 contributions made directly to candidates that give rise to a perception of corruption.

gime of large individual contributions’ appears corrupt” to “Missouri citizens” and that this “inherent” appearance of corruption warrants limits on campaign contributions. *Id.* at 30; see *id.* at 12, 26-28. In the state’s view, an appearance of corruption, sufficient to limit campaign contributions, arises simply because “government officers who receive money appear to be in debt to the donor”; “human nature uniformly perceives a conflict of interest when a public servant makes decisions of interest to large donors.” *Id.* at 12, 30.

In arguing that an “appearance of corruption” arises when candidates, who may or may not also be “government officers” or “public servants,”²¹ make “decisions of interest” to their contributors, Missouri has arrived at an absurd result. As the court of appeals observed in another case, if a presumption of corruption arises from the mere fact that a public official votes in a way that pleases contributors, then “legislatures could constitutionally ban all contributions except those from [an] official’s opponents, a patent absurdity.” *Russell v. Burris*, 146 F.3d at 569. Moreover, if Missouri is right that an appearance of corruption, which the state defines to include “access to an elected official’s time based on levels of contributions,”²² is “unavoidable so long as election campaigns

²¹ Government officials and public servants should not accept outside compensation, or otherwise benefit personally, for the performance of their official responsibilities, and the conflict of interest laws cited by Missouri address this concern. Pet. Br. 30-31. Candidates, however, have an interest protected by the First Amendment in accepting campaign contributions. There is, contrary to Missouri’s tacit suggestion, no analogy between individuals, in their capacity as candidates, accepting campaign contributions, and individuals, in their capacity as government officials, accepting gratuities or bribes for the performance of their official duties. See *McCormick v. United States*, 500 U.S. at 272-73 (distinguishing extortion and campaign contributions).

²² This definition is surely too broad. See *McCormick v. United States*, 500 U.S. at 272 (“[s]erving constituents and supporting

are financed by private contributions," then public financing would be the only appropriate legislative response. See Pet. Br. 28 (internal quotation marks and citations omitted).

As Missouri's arguments demonstrate, the "appearance of corruption" is an amorphous, and dangerous, standard for regulating political speech. Appearances are in the eye of the beholder, and an appearance of corruption may arise whenever an official votes or takes other actions that are consistent with the position of a contributor. To find an "appearance of corruption" when legislators "act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries" would subject to regulation "conduct that . . . is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *McCormick v. United States*, 500 U.S. at 272. The court of appeals' requirement that an appearance of corruption must be "objectively reasonable," which follows readily from the Court's requirement that a state must "demonstrate" some real harm, *Edenfield*, 507 U.S. at 771, avoids these problems.

legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator"). Access—the opportunity to present one's case—is not bought; instead, individuals and groups contribute to candidates who have similar policy preferences, and candidates meet with, and obtain information from, supporters who share their political goals and beliefs. David Austen-Smith, *Campaign Contributions and Access*, 89 Am. Pol. Sci. Rev. 566 (1995); Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 Am. J. Pol. Sci. 1, 19-20 (1989).

1. *The Court Of Appeals Correctly Gave "Short Shrift" To Senator Goode's Affidavit*

Missouri has no evidence of any problems associated with campaign contributions. In fact, Missouri's own data strongly suggest that contributions in excess of the limits set by the legislature in 1994 do not cause any harm. Missouri, examining two pre-1994 elections, argues that only a small percentage of contributors ("2.38%" and "1.49%") in these elections would have been affected by the \$1075 limit on contributions, Pet. Br. 19, and it also argued in the district court that the contributions that would have been prohibited would have constituted only a very small percentage (.02% and ".5%") of state-wide candidates' total campaign expenditures. State Def. Opposition to Plaintiffs' Motion For Preliminary Injunction 24 (April 3, 1998). The state has no explanation how such a small number of contributions, covering only a very small portion of candidates' campaign expenditures, could cause any "real harm."

In his affidavit, Senator Goode, nevertheless, stated his "belief" that contributions larger than the Missouri limits "have the appearance of buying votes." J.A. 47. This affidavit, however, does not provide any evidence that campaign contributions were a real problem in Missouri. As the court of appeals found, the senator did not point to any "evidence that 'large' campaign contributions were being made" before the limits were enacted in 1994, "much less that they resulted in real corruption or the perception thereof." Pet. App. 6a-7a.

It would have been difficult, if not impossible, for the court of appeals to conclude that this single legislator's perception was "objectively reasonable."²³ The senator,

²³ Judge Gibson's concern that the majority inappropriately assessed Senator Goode's credibility is misplaced. Pet. App. 15a n.6. The majority simply found that, absent some examples or other support, it could not determine from the affidavit standing alone

for example, would have been hard put to explain why a contribution of \$1000 to a candidate for state senate (prohibited by Mo. Rev. Stat. § 130.032.1(2) (Supp. 1998), which limits contributions as adjusted for inflation to \$525) would create an appearance of corruption, but a contribution of \$1000 to a candidate for statewide office (permitted by *id.* § 130.032.1(1), which limits contributions as adjusted for inflation to \$1075) would not create an appearance of corruption. Moreover, Senator Goode's statement that he "believed in 1993 and . . . today [1998] that contributions over [the Missouri] limits have the appearance of buying votes" (J.A. 47) seems at odds with his May 1995 vote in favor of a measure authorizing individuals who were candidates in elections held on or before November 1994 to accept, through December 31, 1996, contributions in unlimited amounts to pay off outstanding obligations.²⁴ Mo. Rev. Stat. § 130.037 (Supp. 1995).

whether there was an "objectively reasonable" public perception of corruption arising from campaign contributions. Indeed, in another case, a district court discounted a similar affidavit submitted by Senator Goode on precisely the same ground—the absence of any factual support. In that case, Senator Goode claimed in his affidavit that "the acceptance of contributions during the general assembly's regular session leads to the appearance of corruption." *Shrink II*, 922 F. Supp. at 1421; *see id.* at 1414-15. The court found that the senator's affidavit did not establish an appearance of corruption. Senator Goode had expressed his "personal opinion[]," but he had "fail[ed] to provide any factual basis for [his] opinion[]." *Id.* at 1421. He "cite[d] no examples or incidents of actual corruption linked to such contributions nor incidents wherein 'innocent' contributions were perceived by the public as being given and accepted for a corruptive intent." *Id.* He did not "relate any incidents wherein [his] constituents voiced displeasure . . . regarding the acceptance of contributions during the general assembly's regular session." *Id.*

²⁴ Senator Goode was the senate "handler" of House Bill 484, which included the provisions for debt retirement subsequently codified at Mo. Rev. Stat. § 130.037 (Supp. 1995). Current Bill Summary, HB 484 (88th Gen. Ass., 1st Reg. Sess. 1995). The Mis-

If Senator Goode had opined after the fact that a majority of the members of the Missouri legislature thought that personal solicitations by certified public accountants caused some harm, his unsupported belief would not justify limits on accountants' commercial speech. *See Edenfield*, 507 U.S. at 771. It is then entirely anomalous to argue, as Missouri does, that the senator's affidavit is enough to support a restriction on political speech.

It is a fair inference that the state has no other—and certainly no better—evidence than Senator Goode's conclusory statements. Missouri has never suggested that it has any objectively reasonable evidence, and it continues to deny any duty to demonstrate that the contribution limit addresses some "real harm." Pet. Br. 29. Indeed, when asked at argument in the court of appeals to identify any additional evidence, Missouri's counsel could suggest only that the state would "put 200 members of the legislature . . . into the courtroom" and "one by one have them come in and testify as to what they heard and what they knew at the time they voted." ²⁵ Argument, Aug. 21, 1998.

souri Senate voted unanimously in favor of HB 484. Mo. Sen. J. 1270-71 (88th Gen. Ass., 1st Reg. Sess. 1995). The legislature's decision to prevent application of the contribution limits adopted by the electorate in November 1994 to campaign debt incurred before that date is understandable, but it does suggest an implicit judgment that the need to pay off outstanding debt outweighed any risk of the appearance of corruption that would arise from accepting unlimited contributions.

²⁵ Although the state's counsel conceded that these legislators would not testify that they were "corruptible," he predicted that the legislators would say that if they accepted more than \$1000 their constituents might believe that they were subject to corruption. *See* Argument, Aug. 21, 1998. This prediction was, perhaps, hazardous; many of the legislators who had voted to impose contribution limits in 1994 also voted, less than one year later, to permit unlimited contributions to retire campaign debt. *See* note 24 *supra*.

The district court's speculation about the evils of campaign contributions, which Missouri repeats, does not fill the void left by Senator Goode's affidavit. Pet. Br. 6 n.3, 8, 34-36. The district court noted that "[n]ewspaper stories and editorials . . . tend to support the senator's statements" and that the voters' approval of Proposition A's \$100, \$200, and \$300 contribution limits "might be viewed as . . . a poll" demonstrating "that the integrity of a state's election process is facing a perceived threat." Pet. App. 31a n.6, 32a & n.7. The voters' approval of the Proposition A contribution limits, which the court of appeals held violated the First Amendment, *Carver*, 72 F.3d 633, speaks as much to an attempt to redress perceptions of economic inequality as it does to any public perception of corruption. There is no evidence that Proposition A was a response to any appearance of corruption in the Missouri electoral process, *see Carver*, 72 F.3d 644-45, and the newspaper discussion of Proposition A quoted by the district court strongly suggests that the purpose of the initiative was to level the playing field and to limit the influence of particular groups, pejoratively labeled "special interests." *See* Pet. App. 32a n.7.

The district court also speculated that the "average Missourian," with a median household income of \$31,046, would consider a political contribution of more than \$1075 to be "large." *Id.* at 40a. It may well be true that the average Missourian would have viewed \$1075 as a large amount in 1998, and it is certainly true that this hypothetical citizen would have viewed \$1075 as a much larger amount in 1976 than in 1998. The district court, however, had no evidence that the average Missourian viewed this sum as large in the sense that *Buckley* employed this term—as creating corruption or the appearance of corruption.

It is hardly surprising that Missouri has no evidence that campaign contributions cause corruption or an ob-

jectively reasonable appearance of corruption. Most "studies have found little or no connection between campaign contributions and legislative voting records." Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo. L. J. 45, 58 (1997). Although these studies rejecting the commonplace assumption that "campaign contributions are the dominant influence on policymaking" may seem counterintuitive, other factors including "party affiliation, ideology, and constituent views and needs" are the dominant forces in legislative behavior. Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L. J. 1049, 1067-68 (1995).

Having no objectively reasonable evidence of any appearance of corruption attributable to campaign contributions, Missouri claims that it can rely on a common sense proposition that "money corrupts." *See* Pet. Br. 36 (referring to "the common sense nature of the inquiry—whether the public believes that recipients of large contributions are beholden to their paymasters"). It is, however, equally a matter of "common sense" that legislators, acting on the basis of self-interest, would establish a system of contribution limits that protects incumbents. Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance*, 73 Cal. L. Rev. 1045, 1076, 1080 (1985). Contribution limits are widely understood as favoring incumbents. *E.g.*, Smith, 105 Yale L. J. at 1072-75. Competing "common sense" propositions—appearance of corruption or incumbent protection—should not be the basis either for sustaining or invalidating Missouri's contribution limits. It is precisely the office of judicial review, and more particularly the requirement that Missouri demonstrate that the appearance of corruption is a "real harm," to ensure that the state has a constitutionally adequate justification for imposing sig-

nificant burdens on "fundamental First Amendment interests." *Buckley*, 424 U.S. at 23.

Missouri's "common sense" is troubling on an additional count. Common sense, as is the case here, may well be wrong. The cynical assumption that "money corrupts" ignores the reality that "campaign contributions are made to support those politicians who already value the same positions as their donors" and that "[j]ust like voters, contributors appear able to sort into office politicians who intrinsically value the same things that they do." Bronars & Lott, 40 J. L. & Econ. at 319, 347. Mistaken perceptions are a doubtful warrant for regulating important constitutionally protected interests. See e.g., *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (mistaken perceptions about mentally retarded persons). Thus, the court of appeals' standard—which would permit a state to regulate on the basis of a mistaken perception of corruption as long as there was some objectively reasonable evidence of that perception—probably provides too little protection for fundamental First Amendment interests.

Missouri, nonetheless, suggests that the Court should take "judicial notice" of "the appearance of corruption" and excuse the state from any responsibility to show that the appearance of corruption is a "real harm." Pet. Br. 33. Ignoring all but one of the Court's cases requiring the government and the states to demonstrate that speech regulations address some "real harm," Missouri suggests that a failure to require any objectively reasonable evidence of real harm in this case can be "harmonized" with the "real harm" requirement in *Turner I*, 512 U.S. 622. *Id.*

Missouri would distinguish *Turner I* on the ground that the harm in that case was not obvious. However, given the fact that most campaign contributions are made

for purposes protected by the First Amendment, the harm, if any, caused by campaign contributions would not seem to be any more or less obvious than the harms caused by the decision of a cable television system not to carry a local broadcast station. Even though common sense might suggest that a broadcast station would lose audience and advertising revenues if not carried on cable, the Court required the government to prove that the "must-carry" regulation addressed a real harm. *Turner II*, 520 U.S. at 195, 197-213. If the government must show that cable television regulations address a real harm, there is no reason why Missouri should not have to make the same showing.

2. Missouri's Anti-Corruption Rationale Masks Additional Purposes

The problem, if any, in Missouri elections is not corruption, or even some appearance of corruption. Missouri simply has no evidence that "[e]lected officials [have been] influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns"; it has no evidence of any "financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497. Missouri's problem, instead, appears to be public perceptions of economic inequality in the political process. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 678-82 (1997) (arguments for contribution limits are often arguments to level the playing field for competing political interests).

Missouri, for example, argues that a total primary and general election contribution of \$2000 would have been forty-seven percent of the disposable income of the average American household in 1995. Pet. Br. 19 n.10, 42. The state's argument that the average family cannot afford to make a \$1000 contribution strongly suggests a

concern that others, who can afford such contributions, have disproportionate influence in the political system. The contribution limit, then, appears to be an attempt, albeit crude, to level the political playing field for competing interests. The Secretary of State of Missouri, as well as the chief election officers and campaign finance supervisors of fourteen other states, also focuses on disparities in disposable income and argues openly that contribution limits are necessary to "check" the influence of "wealthy contributors." Secretary of State of Arkansas *et al.* Br. 8; *see id.* at 9 (if contribution "limits are gauged to allow the contribution of sums far beyond the means of an overwhelming majority of citizens, then [that majority] will naturally perceive that contributors who can approach the limits exert a disproportionate influence over the officials they support").

Ironically, individuals who can afford to make contributions larger than \$1075 and who support political party candidates can easily circumvent Missouri's \$1075 direct contribution limit by making contributions to "political party committees." Missouri law does not limit the amount that an individual can contribute to a political party or to "political party committees," and each party, *see note 11 supra*, can establish a multitude of committees. *See* Mo. Rev. Stat. § 130.032 (Supp. 1998). An individual, for example, who wanted to contribute \$54,825 to a statewide candidate of a political party could make a direct contribution of \$1075 to the candidate and write five checks in the amount of \$10,750 payable to five different "political party committees"—the party's state committee, one of its congressional district committees, one of its state senatorial district committees, one of its state representative district committees, and one of its county committees. Although the contributor could not require anyone of these five committees to make a contribution to a particular candidate, each committee

could contribute up to \$10,750 to the candidate who inspired the contribution.

Thus, to the extent that incumbent legislators are members of a political party, they have done little more than pander to public fears of "big money" by barring direct contributions of more than \$1075 and permitting indirect contributions of much larger sums to themselves and other members of political parties. This pandering, however, comes at a high cost to political outsiders, like Fredman, who lack the advantages of incumbency and party endorsement, and to small political action committees, like Shrink, which work outside mainstream party politics to promote their political goals and to promote the election of candidates committed to these goals.

B. The Campaign Contribution Limit Does Not Alleviate Any Harm "In A Direct And Material Way"

Just as a state must demonstrate that a contribution limit addresses some real harm, it must also demonstrate that the limit will in fact alleviate that harm "in a direct and material way." *NTEU*, 513 U.S. at 475 (internal quotation marks and citation omitted). Absent any evidence that campaign contributions cause corruption or the appearance of corruption, there is, of course, no need for any contribution limit, and there is no way that Missouri could demonstrate, even at a minimum, that the \$1075 limit alleviates any harm in a "direct and material way." Thus, Chief Judge Bowman, consistent with the higher level of scrutiny applied to restrictions on "fundamental First Amendment interests," *Buckley*, 424 U.S. at 23, correctly found that "absent the State's having proven the actual necessity for such a heavy-handed restriction of protected speech," the contribution limit was "not narrowly tailored to serve the alleged interest." Pet. App. 8a (internal quotation marks and citation omitted).

A comparison of Missouri's \$1075 limit, enacted in 1994, and the \$1000 limit approved by *Buckley* in 1976 demonstrates that the state imposed a "heavy-handed restriction of protected speech." Taking inflation into account, a campaign contribution of \$1075 in 1997 was the equivalent of only \$378 in 1976 dollars—that is—\$1075 bought only the same amount of goods and services that \$378 purchased in 1976.²⁶ Missouri's \$1075 limit on campaign contributions applies to contributions made by political action committees like Shrink, as well as to contributions made by individuals,²⁷ and it also must be compared to the \$5000 federal limit on contributions by political committees upheld in *Buckley*.²⁸ 424 U.S. at 35-36. This comparison is important because *Buckley* upheld the \$1000 limit on individual contributions at least in part because the limit on contributions by political committees was five times higher (\$5000) and these committees could fill the fund raising gap created by the \$1000 limit on individual contributions. See 424 U.S. at

²⁶ The same figures, showing the effects of inflation as of 1997, were presented to the courts below.

²⁷ The \$1075 limit applies to "any person other than the candidate," and the term "person" is defined broadly to include an "individual," as well as a "committee." Mo. Rev. Stat. §§ 130.011(22), 130.032.1 (Supp. 1998).

²⁸ There are differences between the federal "political committees" at issue in *Buckley* and state "continuing committees," like Shrink. Federal law, for example, regulated both the number of contributors and the number of candidates to whom contributions were made. *Buckley*, 424 U.S. at 35. Although Missouri law does not impose analogous restrictions on "continuing committees," see Mo. Rev. Stat. § 130.011(10) (Supp. 1998), differences between federal and state committees do not justify different contribution limits unless the state can make some showing that these differences are related to preventing corruption or the appearance of corruption. See *NCPAC*, 470 U.S. at 496-97 ("preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances").

28 n.31, 35-36. The "heavy-handed" effect of Missouri's \$1075 limit on political committee contributions is readily apparent: a campaign contribution of \$1075 in 1997 was the equivalent of only \$378 in 1976 dollars, or only 7.56% of the \$5000 limit upheld by *Buckley*.

It does not take a "scalpel," *Buckley*, 424 U.S. at 30, to probe the differences between the Missouri contribution limit and the \$1000 limit upheld by *Buckley* in 1976. *Buckley*'s \$1000 contribution limit would have been \$2840 in 1997 when adjusted for inflation; that is, it would have taken \$2840 to buy the same amount of goods that \$1000 bought in 1976. Similarly, *Buckley*'s \$5000 limit on political committee contributions would have been \$14,200 in 1997 when corrected for inflation; that is, it would have taken \$14,200 to buy the same amount of goods that \$5000 bought in 1976. Chief Judge Bowman found correctly that Missouri's \$1075 limit "cannot compare with the \$1,000 limit approved in *Buckley*." Pet. App. 8a.

C. Protection Of First Amendment Rights Requires Assurance That The State Has Evidence Of Some "Real Harm"

The requirement that government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" is "critical." *Rubin*, 514 U.S. at 487 (internal quotation marks and citation omitted). Absent some evidence of real harm, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.* (quoting *Edenfield*, 507 U.S. at 771). Similarly, absent some evidence that corruption or the appearance of corruption is a real harm, Missouri "could with ease restrict [political] speech in the service of other objectives"—leveling the playing field, protecting incumbents, or merely pandering to popular fears—"that could not themselves justify a burden on [political] expression." The real harm

requirement "smoke[s] out" the risk that Missouri has burdened political speech for unconstitutional purposes. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). The real harm requirement also provides a basis for ensuring that there is at least some rough proportionality between the alleged harm and the burdens imposed on speech.

The court of appeals' requirement that the state prove that corruption or the appearance of corruption is a "real problem," Pet. App. 6a, does not establish an "insurmountable evidentiary threshold." Resp. Bray Br. 33. The court of appeals did not require the state to produce "elaborate, empirical verification," *id.* at 32 (quoting *Timmons*, 520 U.S. at 364); it did not impose "an exact fit requirement." Pet. Br. 38. The holding is in reality quite limited: the contribution limit violates the First Amendment because Missouri, on cross motions for summary judgment, was "unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest" in preventing corruption or the appearance of corruption. Pet. App. 7a.

Government must have some evidence of "real harm" to regulate speech on cable television or to restrict commercial speech. *Turner II*, 520 U.S. at 195; *Edenfield*, 507 U.S. at 770-71. As a prerequisite to approving contribution limits that "implicate fundamental First Amendment interests," *Buckley*, 424 U.S. at 23, the court of appeals did not ask for too much when it required Missouri to demonstrate that there were "genuine problems." Pet. App. 5a. The state, however, has never made any effort to determine whether campaign contributions cause any real harm,²⁹ and it persists in the view that "it is unneces-

²⁹ The Missouri legislature enacted the contribution limits at issue in this case in 1994. The court of appeals then held in 1995 that another set of Missouri contribution limits, adopted in a 1994 initiative, violated the First Amendment because Missouri had "no

sary . . . to demonstrate that [corruption and the appearance of corruption] are actual problems in Missouri's electoral system." *Id.*; see Pet. Br. 29. If the state had demonstrated that there were "genuine problems," Chief Judge Bowman made clear that the court of appeals would have deferred to the state's judgment about where the line should have been drawn. Pet. App. 5a; see *id.* at 9a.

Challenges to campaign contribution limits, like challenges to restrictions on the distribution of the franchise, are challenges to the basic "assumption that the institutions of state government are structured so as to represent fairly all the people." *Kramer v. Union-Free School District No. 15*, 395 U.S. 621, 628 (1969). The courts have a special responsibility when they review rules that "cook up the representative body in the first place." Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311, 328; see *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The court of appeals correctly exercised this responsibility by holding that Missouri must demonstrate that campaign contributions cause some "real problem." Pet. App. 6a.

evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions." *Carver v. Nixon*, 72 F.3d at 643. Missouri did not make any effort to respond to this decision and to find evidence that would be sufficient to meet the court of appeals' standard. In fact, when the legislature amended the campaign finance statutes in 1997, it set the contribution limits in exactly the same amounts originally enacted by the legislature in 1994. Compare Mo. Rev. Stat. § 130.032.1 (1994) with Mo. Rev. Stat. § 130.032.1 (Supp. 1998).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

JEREMIAH W. (JAY) NIXON,
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Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN and JOAN BRAY,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**REPLY BRIEF FOR RESPONDENT JOAN BRAY
IN SUPPORT OF PETITIONERS**

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ARGUMENT

Respondents portray the decision below as an unexceptional attempt to ensure that Missouri's campaign contribution limits addressed a "real harm."¹ But the Eighth Circuit's ruling is in fact a radical departure from this Court's pragmatic approach to laws regulating the influence of private monetary payments to powerful public officials. Instead of recognizing the critical importance of combating both the reality and the appearance of corruption, and the difficulties of detecting secret influence-brokering, the Eighth Circuit has effectively declared state contribution limits *per se* unconstitutional, unless a state proves that its elected representatives have already abused the campaign financing process. That determination has no basis in this Court's First Amendment jurisprudence or recognized standards of legislative fact-finding. And the Eighth Circuit's elevated evidentiary threshold is particularly unwarranted in this case, where the challenged law has little First Amendment impact.

I.

**The Insuperable Evidentiary Burden That
the Eighth Circuit Has Imposed on Missouri
Defies Binding Precedent and Violates
Traditional Principles of Judicial Review.**

The Eighth Circuit has held that contribution limits are unconstitutional, unless states prove that any appearance of corruption inherent in the financing system is also "objectively 'reasonable'" — a burden they can carry only by producing

1. For the purposes of this Reply Brief, "Respondents" refers to Shrink Missouri Government PAC ("SMGPAC") and Zev David Fredman.

“demonstrable evidence” of illegal conduct connected to contributions in the states at issue.² *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 521, 522 (8th Cir. 1998) (quoting *Russell v. Burris*, 146 F.3d 563, 569 (8th Cir.) (invalidating Arkansas’s contribution limits for failure to prove actual corruption), *cert. denied*, 119 S. Ct. 510 (1998)). That ruling flouts *Buckley* by rejecting its account of the harms that government may combat with contribution limits and its standard for reviewing the sufficiency of the state’s interest in reducing the appearance of corruption. This Court should reassert the authority of *Buckley* and reverse the decision below.

A. This Court Has Consistently Recognized That Reasonable Contribution Limits Are Justified by the State’s Compelling Interest in Eliminating Both Real and Apparent Corruption.

This Court has long recognized that the appearance of corruption is an independent harm “[o]f almost equal concern” to actual corruption. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (*per curiam*). According to *Buckley*, the appearance of corruption stems from “public awareness of opportunities for abuse inherent in a regime of large individual financial contributions.” *Id.* (emphasis added). The problem derives not from wrongdoing in the past but from the *potential* for

2. The briefs defending the decision below confirm that the foregoing description of the Eighth Circuit’s ruling does not overstate it. See Brief of Respondents Shrink Missouri Government PAC and Zev David Fredman (“Resp. Br.”) at 34 (arguing that there can be no “reasonable perception of corruption” without “evidence connecting corruption to campaign contributions”); Brief of Senator Mitch McConnell *et al.* (“McConnell Br.”) at 20 (“[T]he ‘appearance of corruption’ standard, in the absence of any claim of actual corruption, is too vague a foundation upon which to base a restriction on core political speech.”).

corruption in the future. When politicians can, but do not, eliminate the “corrupting potential” of large contributions, *id.* at 36, the populace loses faith in the integrity of representative government. Because reasonable contribution ceilings “focus[] precisely” on that corrupting potential, while imposing only a marginal First Amendment burden, they are lawful. *Id.* at 28.

Respondents’ attempt to overturn this central tenet of *Buckley* by questioning the corrupting potential of large contributions, *see* Resp. Br. at 40-41, fails for two main reasons. First, documented instances of actual corruption connected to large contributions, such as those alluded to in *Buckley*, *see* 424 U.S. at 27 n. 28, are indisputable proof that such contributions offer opportunities for abuse. Respondents do not explain why unlimited contributions in Missouri would not carry the same corrupting potential as the unlimited contributions to federal candidates permitted before the Federal Election Campaign Act (“FECA”) was amended in 1974.

Second, the studies that supposedly cast doubt on the corrupting potential of large contributions examine only the correlation between PAC contributions and congressional voting. But the corruption — actual and potential — that undermines democracy, and on which contribution limits focus precisely, may not be so narrowly defined. To the contrary, the contributions “[l]ooming large in the perception of the public” when FECA was enacted included some given merely “to gain a meeting with White House officials” or to get corporate representatives “in the door.”³ *Buckley*, 519 F.2d 821, 839

3. *Buckley* thus directly contradicts Respondents’ claim that “[a]ccess . . . is not bought.” Resp. Br. at 36 n.22. Indeed, one of the commentators Respondents cite for that proposition actually admits: “Money may facilitate an opportunity to present one’s case, and in the absence of conflicting testimony, the member may change his or her

nn.36, 37 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976). Granting privileged access to powerful public officials in exchange for infusions of campaign cash is thus a classic example of *quid pro quo* corruption.⁴

Moreover, contributions do affect legislative behavior. Empirical studies that examine nothing more than congressional floor votes miss the far greater risk that a legislator will return favors to contributors before a bill actually hits the floor — in drafting legislation or in proposing amendments during mark-up, for example. Studies focusing on behind-the-scenes participation in the lawmaking process show that contributions have a “significant degree of influence” there. Frank J. Sorauf, *Inside Campaign Finance* 169 (1992); see Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Sci. Rev. 797 (1990). And even the studies that focus only on

position as a result of the meeting.” Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 Am. J. Pol. Sci. 1, 19 (1989). Awarding the scarce and valuable opportunity to influence policy as a special favor to contributors is thus corruption of the most basic kind. Moreover, when access is granted disproportionately to moneyed interests, contribution limits are justified to prevent systemic corruption of the democratic process. See *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 n.19 (1981) (upholding limits on contributions to PACs, because PACs could “corrupt the political process” by influencing it “to an extent disproportionate to their public support”); cf. *Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636, 647 (1999) (recognizing a “substantial state interest” in preventing “domination of the initiative process by affluent special interest groups”).

4. The value of privileged access to a decision-maker is also reflected in rules barring *ex parte* communications with judges. Because we do not require that all parties to a policy debate be present whenever one party lobbies an official, alternative regimes are needed to reduce the risk that access — and policy — will be auctioned off to the highest bidder.

actual votes find that campaign contributions have an appreciable effect when “low-visibility, nonpartisan” issues are under deliberation. David B. Magleby & Candice J. Nelson, *The Money Chase* 78 (1990).

The corrupting potential of large contributions is recognized even among elected officials. For example, Senator John McCain has described the federal campaign financing system as “an elaborate influence peddling scheme in which both parties conspire to stay in office by selling the country to the highest bidder.” Alison Mitchell, *McCain Exhorts His Party To Reject Campaign System*, N.Y. Times, July 1, 1999, at A17. Although Senator McCain is assailing unlimited “soft money” contributions to political parties, the corrupting potential of unlimited contributions would be all the greater if the funds were given directly to candidates.⁵

Notwithstanding the corrupting potential of contributions to candidates in the federal system, and the appearance of corruption that contributions have caused both historically and in contemporary times, the Eighth Circuit has held that a state may not eliminate identical opportunities for abuse unless it can prove that its officials have also been involved in corrupt campaign financing practices.⁶ If states have no “demonstrable

5. Respondents contend that “very large, . . . ‘soft-money’ contributions” are a more probable cause of any “widespread perception of corruption” than “\$1000 or \$1075 contributions made directly to . . . candidates.” Resp. Br. at 34 n.20. But the fact that the “very large” contributions create more of an appearance of corruption than \$1,075 contributions is precisely why the decision below should be reversed.

6. For evidence of at least perceived corruption dating back to the early part of this century, see *United States v. UAW*, 352 U.S. 567, 570-83 (1957) (describing the events precipitating the enactment and amendment of the Federal Corrupt Practices Act).

evidence" of past misconduct within their own governments, they must live with an increasingly destructive appearance of corruption, as well as the corrosive effects of actual corruption, until they can penetrate the barriers of secrecy and collect the requisite proof. Only then will the appearance of corruption inherent in a regime of large contributions be "objectively reasonable"; only then will the state show "genuine problems" that may be addressed with contribution limits.

The Eighth Circuit's evidentiary barrier is directly at odds with this Court's campaign financing jurisprudence. This Court has never questioned either the corrupting potential of large contributions or Congress's discretion to design laws addressing that threat.⁷ See *FEC v. National Right to Work Comm. ["NRWC"]*, 459 U.S. 197, 210 (1982) ("[W]e accept Congress' judgment that it is the potential for such influence that demands regulation."); *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 n.20 (1981) ("Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme."). Even when the Court has invalidated expenditure limits, it has reaffirmed the need to defer to legislative judgments about the need for and levels of contribution limits. See *FEC v. National Conservative Political Action Comm. ["NCPAC"]*, 470 U.S. 480, 500 (1985)

7. Respondents' claim that Missouri must prove that a \$1,075 contribution is "'large' in the sense of causing corruption or the appearance of corruption," Resp. Br. at 25, turns *Buckley* on its head. The *Buckley* Court never asked Congress to prove that a \$1,000 contribution was large. To the contrary, *Buckley* explicitly rejected the claim that \$1,000 was too low to influence a federal candidate. See 424 U.S. at 30. *Buckley* held that as long as some limit were needed — which it unquestionably was in a system that permitted unlimited contributions — the legislature had the discretion to decide where to set the limits, provided that candidates were still able to amass the necessary funds for campaigns. See *id.*; see also Bray Br. at 45-49.

(recognizing the "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"). This Court should therefore reject the Eighth Circuit's attempt to force Missouri to prove again what experience has firmly established.

B. This Court Has Invalidated Prophylactic Laws Addressing Threats to Governmental Integrity and Legitimacy Only When There Was No Basis Whatsoever for Concern About Potential Corruption.

Respondents argue that this Court has repudiated *Buckley*'s deferential approach to the regulation of large contributions and that the Eighth Circuit's demand for case-by-case proof of jurisdiction-specific corruption should therefore be affirmed. But the precedents Respondents cite do not support their thesis. In the only case they mention that actually involved a law regulating campaign contributions — *NWRC* — they admit that this Court "deferred broadly to Congress." Resp. Br. at 27. And in the other cases they cite involving efforts to curb the influence of money on public officials, this Court refused to second-guess the legislature, unless there was no basis whatsoever for fearing real or perceived corruption.

The first case Respondents cite, *United States v. National Treasury Employees Union ["NTEU"]*, 513 U.S. 454 (1995), does not support the Eighth Circuit's decision. As has been previously explained, see Brief of Respondent Joan Bray ("Bray Br.") at 35-37, this Court used different language in *Buckley* and *NTEU* but both cases applied the same pragmatic evidentiary standard. Just as *Buckley* asked for reasons to believe that the problems Congress sought to prevent were real rather than "illusory," 424 U.S. at 27, so *NTEU* asked for reasons to believe that the harms Congress sought to prevent were "real" rather than illusory, 513 U.S. at 475 (internal

quotations omitted). Under that standard, *NTEU* invalidated a ban on honoraria to low-level officials because there was “no evidence” to support fears about corrupting rank and file employees. *Id.* at 472. But the *NTEU* Court would have permitted Congress to “assume” that honoraria to judges, for example, *would* create an appearance of improper influence. *Id.* The assumption could be made because the analogy between judges and other powerful decision-making officials for whom there was “limited evidence of actual or apparent impropriety,” *id.*, made it reasonable to believe that they would be perceived similarly, even without proof of past judicial misconduct. Likewise, the analogies between federal candidates and state candidates make it reasonable to believe that unlimited contributions would create the same appearance of corruption in Missouri as they did in the federal system prior to the enactment of FECA.

Respondents’ citation to *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), is similarly misplaced. That case involved a challenge to limits on *independent expenditures* by political parties. Before it would overrule the longstanding judgment that such expenditures had “a tendency . . . to corrupt or give the appearance of corruption,” *NCPAC*, 470 U.S. at 497, the *Colorado Republican* plurality sought evidence of “special dangers of corruption associated with political parties.” 518 U.S. at 616. Because the government could not point to *any* such evidence, the limits could not be sustained. *See id.* at 618.

Rather than imposing a new, heavy burden on the government, *Colorado Republican* thus reaffirms *Buckley*’s standard for establishing the state’s interests in preventing the reality and appearance of corruption. With absolutely no evidence that independent expenditures caused such harms, the problems alleged in *Colorado Republican* remained “illusory,”

and the interests in averting them could not justify the challenged limits. By contrast, the plurality explicitly confirmed that “reasonable contribution limits directly and materially advance the Government’s interest in preventing exchanges of large financial contributions for political favors.” *Id.* at 615. In fact, the plurality went out of its way to assuage any doubts on that score, stating: “We could understand how Congress, were it to conclude that the potential for evasion of individual contribution limits was a serious matter, might decide to change the statute’s limitations on *contributions* to political parties.” *Id.* at 617 (emphasis added).

Finally, the commercial speech cases cited by Respondents, *see* Resp. Br. at 29, provide no authority for the Eighth Circuit’s evidentiary test. None of those cases stands for the proposition that states must first suffer, and then prove they have suffered, actual harm before they will be justified in adopting prophylactic measures.⁸ To the contrary, in *Rubin v. Coors Brewing Co.*, this Court acknowledged a “significant interest in . . . preventing brewers from competing on the basis

8. Indeed, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), suggests that the evidence available in this case is precisely the sort that supports preventive measures. The *Zauderer* Court confirmed this Court’s prior holding in *Ohralik v. Ohio Bar Ass’n*, 436 U.S. 447 (1978), that two features of in-person solicitation by lawyers “justified a prophylactic rule”: first, the practice was “rife with possibilities for . . . the exercise of undue influence, and outright fraud,” and second, it “presents unique regulatory difficulties because it is not visible or otherwise open to public scrutiny.” 471 U.S. at 641 (internal quotations omitted). *Zauderer* invalidated Ohio’s attempt to discipline an attorney merely for advertising, because truthful advertising lacked those features. But it is precisely the possibilities for the exercise of undue influence and the regulatory difficulties presented by secret corruption that justified the prophylactic contribution limit upheld in *Buckley*, *see* 424 U.S. at 27, and should also justify it in Missouri.

of alcohol strength" because the state's concern about *future* harm made obvious sense: "We have no reason to think that strength wars, if they were to occur, would not produce the type of social harm that the Government hopes to prevent." 514 U.S. 476, 485 (1995).⁹

Respondents' citations to *Edenfield v. Fane*, 507 U.S. 761 (1993), and *Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy*, 512 U.S. 136 (1994), do not help their case. Those cases employ evidentiary standards completely at odds with that of the Eighth Circuit. *Edenfield* indicates that "anecdotal evidence, either from Florida or another State" might have validated Florida's ban on in-person solicitation by certified public accountants. 507 U.S. at 771 (emphasis added). *Ibanez* explains that if this Court had been persuaded that use of a "CFP" (certified financial planner) designation were "inherently" misleading, the state's "concern about the possibility of deception" would have had support and the Board would have been justified in taking preventive action. 512 U.S. at 145 (internal quotation omitted); see *id.* at 150 (O'Connor, J., concurring in part and dissenting in part) ("States may prohibit inherently misleading speech entirely."). This Court invalidated the ban and the disciplinary action at issue in *Edenfield* and *Ibanez* because Florida had no basis for them. But the Eighth Circuit invalidated Missouri's contribution limits notwithstanding evidence of actual corruption from another jurisdiction and solid grounds for

9. The *Rubin* Court did not question the sufficiency of the state's interest but instead invalidated the restriction at issue in that case because other less restrictive regulatory regimes were available to address the harm. But contribution limits focus precisely on the problem of large contributions, and experience has already shown that less restrictive regimes banning bribery and requiring mere disclosure are inadequate to address that problem. See *Buckley*, 424 U.S. at 27-28.

concluding that the appearance of corruption is "inherent" in a system of unlimited campaign contributions.

In sum, this Court has not "supplemented" *Buckley* with a new and higher evidentiary standard for establishing the government's interests in preventing the reality and appearance of corruption caused by large campaign contributions, as Respondents suggest. Resp. Br. at 33.¹⁰ This Court did not permit the government to invoke harms that were wholly "illusory" in *Buckley*, 424 U.S. at 27, and since *Buckley* this Court has continued to ask for reasons to believe that problems states seek to prevent are "real," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). But as long as there has been *some* basis for concern — whether "anecdotal evidence," *Edenfield*, 507 U.S. at 771, or "sound reasoning," *Turner*, 512 U.S. at 666 (internal quotation omitted) — this Court has recognized the sufficiency of asserted state interests in preventing the reality and appearance of corruption.¹¹

10. The different degree of deference accorded to Congress in *NRWC* as opposed to *NCPAC* or *Colorado Republican*, see Resp. Br. at 27, is not the result of a doctrinal shift but of the Court's adherence to its distinction between contributions and independent expenditures.

11. Respondents are therefore wrong to suggest that Missouri has claimed the right to regulate with no basis whatsoever. See Resp. Br. at 25-26. Missouri merely questions the Eighth Circuit's refusal to acknowledge that reason and experience provide that basis. See *infra* Point I(C). Moreover, the deference owed to the Missouri legislature when the fundamental legitimacy of state government is in question is necessarily greater than that owed to Congress in *Turner*, which involved commercial practices of far less moment and into which Congress had no special insight.

C. The State's Compelling Interest in Combating the Reality and Appearance of Corruption Is a Matter of Legislative Fact for Which No Jurisdiction-Specific Empirical Evidence Is Required.

The diverse *amici* taking interest in this case, including 29 states and the federal government, confirm that the decision whether Missouri has established its compelling interest in preventing real and perceived corruption will have far-reaching ramifications. Because the sufficiency of the state's interest is a question typically resolved through legal reasoning that draws on precedent, logic, shared experience, and common sense, that determination is best regarded as a matter of legislative fact, subject to broad standards of judicial notice. Although evidence submitted by the parties may help to inform that reasoning, the government's justification of the challenged statute cannot properly be regarded as an adjudicative fact requiring empirical proof specific to the parties — the approach the Eighth Circuit has taken.

Legislative facts are those which aid a court in the exercise of its lawmaking, as opposed to adjudicative, power. *See* Fed. R. Evid. 201(a) advisory committee notes. Although the line is not always easy to draw, it is clear that a court is never more engaged in its lawmaking functions than while reviewing the constitutionality of a statute, so the facts it considers in performing that task are properly characterized as legislative facts. *See* 1 Jack B. Weinstein *et al.*, *Weinstein's Evidence* ¶ 200[04], at 200-21 (1996).

Because legislative facts go to the legal reasoning in a case, they are not subject to strict application of the Rules of Evidence, and judicial notice may freely be taken of them. *See* Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5103, at 476 (1977). Judicial notice of

legislative facts is proper even if those facts are in dispute or are not fully supported by the record. *See* Weinstein, *supra*, ¶ 200[03], at 200-17. In fact, when the constitutionality of a statute is in issue, and judicial review will affect the rights of non-parties, "courts have always taken notice of facts without any evidence in the record." Wright & Graham, *supra*, § 5102, at 462. In such cases, "the judge is determining the content of our substantive law, and formal restrictions on resort to extra-record information may impede its growth."¹² Weinstein, *supra*, ¶ 200[04], at 200-25.

Buckley's pragmatic approach to the establishment of the state's interest in preventing real and apparent corruption is a classic case of legislative fact-finding.¹³ The *Buckley* Court referred to anecdotal evidence of actual corruption, but it relied principally on logic and common sense in holding that the government was justified in closing opportunities for abuse that inhered in systems permitting large contributions. No empirical evidence was cited for that proposition, and none was needed,

12. Of course, in a First Amendment case, legislative fact-finding must be based on more than a hunch. But "in other First Amendment contexts, [this Court has] permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (citations and internal quotations omitted). The Eighth Circuit cannot just ignore those factors.

13. The First Circuit has expressly recognized this point in *Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999) (explaining that the state's interest in combating real and apparent corruption rests on "so-called 'legislative facts,' which go to the justification for a statute [and] usually are not proved through trial evidence but rather material set forth in briefs, the ordinary limits on judicial notice having no application to legislative facts").

because the Court's shared understanding of human nature, and the country's long experience with money in politics, made the conclusion self-evident. Similarly, in recognizing that "Congress reasonably could assume that payments of honoraria to judges . . . might generate a[n] . . . appearance of improper influence," *NTEU*, 513 U.S. at 473, this Court accepted the corrupting potential of such payments without specific evidence of judicial bribes — as a matter of legislative fact.

The Eighth Circuit's demand for empirical, party-specific proof thus reflects a fundamental misunderstanding of the nature of constitutional justification. The legislative fact-finding involved in assessing Missouri's interest in combating the corrupting potential of large contributions is not compatible with that court's refusal to consider experience in other jurisdictions, its disregard of common sense reasoning in this Court's campaign finance cases, or its truncated description of the evidence supporting the district court opinion.¹⁴ Because the Eighth Circuit's misconception effectively bars state efforts to limit contributions, even when the First Amendment impact is limited, this Court should reverse the decision below.

14. Although jurisdiction-specific evidence should not have been necessary, it was available in this case. See *Bray Br.* at 39-42. The Eighth Circuit ignored everything except Senator Goode's affidavit, which it improperly discounted as only a "single legislator's perception." *Shrink*, 161 F.3d at 522. Contrary to that demeaning description, the affidavit in fact proffered an account of the "concerns" of Missouri's Joint Interim Committee on Campaign Finance Reform about "the need for campaign contributions versus the potential for buying influence." (JA 47.)

II.

The Eighth Circuit's Unprecedented Demands Are Particularly Misplaced Here, Where Contribution Limits Have Only a Marginal Impact on First Amendment Rights.

Respondents cannot show that Missouri's contribution limits imposed a severe burden on their constitutional rights. The elevated procedural hurdles erected by the Eighth Circuit are thus especially inappropriate in this case. Moreover, Missouri's limits would survive First Amendment challenge even if *Buckley* were read to require the application of strict scrutiny, as the Eighth Circuit has held. Because there is no basis for overturning *Buckley*'s holding on contribution limits, the decision below should be reversed.

In a facial First Amendment challenge, courts should not find that contribution limits impose a severe burden, unless two conditions have been satisfied. First, plaintiffs should have to demonstrate that a significant number of candidates have not been able to amass the resources for effective advocacy. See *Buckley*, 424 U.S. at 21. Contribution limits should not be held unconstitutional on their face if they affect only one lone candidate, while the vast majority of candidates can successfully raise sufficient funds. See *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992) (requiring that a law impose substantial constitutional burden in a "large fraction of . . . cases" to warrant facial invalidation).

Second, the failure to amass the necessary funds must be fairly attributable to the contribution limits, rather than other factors. There are many reasons why an individual candidate may be unable to raise substantial sums: he may not be willing to do the work necessary to run a viable campaign; he may have no base of support from prior involvement in civic affairs or

through recognition for another achievement; or he may be unattractive to supporters for a host of reasons, from a lackluster speaking style to unpopular political positions. Limits — as opposed to other factors — place a severe burden on speech only when they prevent otherwise qualified, hardworking candidates from raising enough funds to communicate with the voters. *Cf. American Party v. White*, 415 U.S. 767, 787 (1974) (noting that “hard work and sacrifice” does not make the burden of signature-gathering too onerous, especially when others seeking ballot access have carried it).

Respondents have established neither prerequisite. The suggestion that the limits had a dramatic effect on candidates other than Fredman — which appears for the first time in Respondents’ brief to this Court — is contradicted by the record. (JA 24-28.) In addition, Respondents’ affidavits show that their own choices, not the limits, were responsible for their fundraising failure.

Fredman claims that he could not run an effective primary campaign without immediate large contributions. But he identifies no one who would have bankrolled that campaign, and SMGPAC had never raised more than \$1,800 in any prior year. Moreover, Fredman recites no facts to support his asserted need for large contributions. There is no evidence that Fredman made any attempt to collect seed money in \$1,025 increments or to ask supporters for fundraising help, so there is no way to know how much money he might have raised. Nor did he make any attempt to spend the early PAC contribution in ways that would increase his visibility and augment his treasury.¹⁵ But he did run quite an effective campaign once he

15. SMGPAC could have made independent expenditures to assist Fredman’s campaign or called potential supporters and asked them to

made a “reasonably diligent” effort, *Storer v. Brown*, 415 U.S. 724, 742 (1974), capturing 20% of vote with only 12 days’ fundraising and only 6 individual contributions — all of which were *at or under the enjoined limit* — plus \$2,325 from SMGPAC. That success suggests that a comparable effort as late as March 1998 might have won the attention of the Republican party leaders — but we will never know, because Respondents made no effort at all until the Eighth Circuit enjoined the law.

Nor did the limits have a greater impact on candidates other than Fredman. Notwithstanding counsel’s insinuation, *see* Resp. Br. at 24, there is no record evidence of “invidious discrimination against challengers as a class,” a claim absent entirely from Respondents’ complaint and previously rejected in *Buckley*.¹⁶ 424 U.S. at 31. To the contrary, Missouri

contribute to his committee. Fredman received no contributions (except from the PAC) for the first year of his candidacy, so any donor the PAC could have found would have been helpful. The potential donors whom SMGPAC called as soon as the limits were enjoined could have been called pre-injunction, had the PAC been as interested in advancing Fredman’s campaign as it apparently was in making a record for this litigation.

16. Respondent Bray’s concern that she might be harmed if the limits were lifted says nothing about incumbents as a class. Bray ran even her first campaign, *as a challenger*, largely with individual contributions of less than \$100 — and won. Affidavit of Joan Bray, sworn to on April 30, 1998, ¶ 5. Moreover, even her opponent in the last election stated only that large contributions would be helpful to his campaign but not that he would be differentially disadvantaged by contribution limits. Affidavit of Alexander Hasler, sworn to on July 26, 1998 (attached to Reply Brief of Appellants in the Eighth Circuit). In any event, Bray’s concern was not that she would lose if the limits were invalidated — she in fact won her last election — but that even if she continued to raise funds in small increments, her reputation would be tarnished by association with a system inherently carrying an appearance of corruption. *Id.* ¶ 6.

campaign finance data show that challengers were able to raise large sums under the limits and sometimes raised even more than the incumbent. (JA 24-27.)¹⁷

Missouri's contribution limits thus imposed no more than the "marginal" First Amendment burden inherent in any contribution limit. *Buckley*, 424 U.S. at 20. The limits therefore did not warrant strict scrutiny, *see* Bray Br. at 13-28, much less the heightened evidentiary standard imposed by the Eighth Circuit. But even if *Buckley* is read to have subjected FECA's \$1,000 contribution limit to strict scrutiny, Missouri's limits would survive because they too "focuse[d] precisely on the problem of large campaign contributions . . . while leaving persons free" otherwise to exercise key First Amendment freedoms. *Buckley*, 424 U.S. at 28.

Despite *Buckley*, Respondents attempt to show that Missouri's contribution limits will not alleviate the appearance of corruption "in a direct and material way." Resp. Br. at 45. But their argument is only that inflation has rendered the limits too "heavy-handed" — a judgment about the appropriate level of the ceilings, which *Buckley* left to the legislature unless the limits prevented candidates from amassing necessary campaign funds. Because Missouri's ceilings had no such impact, the changing value of money over time has no constitutional significance.¹⁸ *See* Bray Br. at 45-49. Indeed, even the

17. Contrary to Respondents' suggestion, *see* Resp. Br. at 24., the figures do not include unregulated funds given to political parties.

18. The inconvenience of fundraising under the \$1,000 federal limit is no better a reason to invalidate Missouri's law. *See* McConnell Br. at 7. *Buckley* gives Congress the power to address that problem by raising the limits or, better yet, enacting a public funding system. Judicial intervention is thus unnecessary to save Congress from itself.

practical significance of inflation is questionable when a federal candidate can raise \$36.3 million in only four months. *See* Richard L. Berke, *Bush Announces a Record Haul, And Foes Make Money an Issue*, N.Y. Times, July 1, 1999, at A1.

The argument that contribution limits do not "materially advance a 'sufficiently important interest'" because the campaign finance system is "riddled with exceptions," Brief *Amicus Curiae* of the American Civil Liberties Union *et al.* at 15, is similarly unavailing. The purpose of contribution limits is not to eliminate campaign spending but to combat the uses of money with obvious corrupting potential.¹⁹ Of course, if other uses of money do have corrupting potential, the solution is not to give up on regulating campaign finances but to close the widely recognized loopholes.²⁰ The *Colorado Republican* plurality recognized as much in noting that Congress could change the law governing soft money contributions to political parties. *See* 518 U.S. at 617.

In sum, neither Respondents nor their supporting *amici* have offered any reason to reconsider *Buckley*'s holding about the constitutionality of *contribution* limits — the only question

19. Respondents speculate that the state's asserted interest in combating perceived corruption masks an intent to "level the playing field." Resp. Br. at 44. But the fact that Missouri does not limit contributions to political parties suggests precisely the opposite: the state has focused on contributions with obvious corrupting potential, not on what individuals can afford to spend on politics. Moreover, the "leveling" effect of contribution ceilings is a constitutionally permissible consequence of limiting the real and apparent improper influence of big money on candidates.

20. The fact that contribution limits may not be *sufficient* to stem the loss of public confidence is hardly a reason to find them constitutionally invalid, as some *amici* suggest. *See* McConnell Br. at 4-5. According to that logic, this Court would also have to invalidate laws banning bribery.

presented for review in this case. Indeed, it would be inappropriate and dangerous to reconsider *Buckley*'s distinction between contributions and expenditures without first ensuring that this Court had a complete factual record and thorough legal briefing by the parties about the impact of campaign expenditures on the integrity and legitimacy of the federal system. Because this Court can decide this case within the parameters of *Buckley*, and Missouri's limits are constitutional under *Buckley*, this Court should reverse the decision below.

CONCLUSION

For the foregoing reasons and those stated in Bray's main brief, Petitioners' briefs, and the briefs *amici curiae* in support of Petitioners, the Eighth Circuit's decision should be reversed.

Respectfully submitted,

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No. 98-963

IN THE
Supreme Court of the United States

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN, and JOAN BRAY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION AND SUMMARY OF ARGUMENT

In its opening brief, Missouri demonstrated that this case is controlled by *Buckley v. Valeo*, 424 U.S. 1 (1976). There, this Court acknowledged that a transfer of money from a contributor to a candidate is not pure speech and that limits on such transfers only marginally affect First Amendment rights. This Court further recognized the government's interest in protecting the integrity of the political system by preventing both the fact and the appearance of corruption inherent in a regime of unlimited contributions to candidates. The Court held that, when weighed against the minimal burden placed on First Amendment rights, this interest was constitutionally sufficient to support a \$1,000 limit on contributions to candidates for federal office, and that Congress must be given substantial latitude in setting the lawful contribution limit. *Id.* at 28, 30.

Respondents, however, claim that in enacting the challenged contribution limits, Missouri was not entitled to rely on this Court's (and Congress') prior recognition that the public perceives a "system permitting unlimited financial contributions" to be "inherent[ly]" corrupt. *Buckley*, 424 U.S. at 28. Instead, say respondents, post-*Buckley* cases impose a new, supplemental requirement that a State produce empirical proof of such a public perception and hard evidence that the perception is correct before the State can enact a contribution limit. Moreover, respondents contend, the State also must present evidence that its chosen limit on contributions to candidates is narrowly tailored to address the precise contribution amount at which a public perception of corruption exists. This failure of hard proof, say respondents, requires invalidation of Missouri's law.

These arguments are but a thinly-disguised attempt to overrule *Buckley*, for they attack its central premise that the public perceives a regime of unlimited political con-

tributions as inherently corrupt. Respondents thus bear the heavy burden of demonstrating that decisions since *Buckley* have completely undermined this central premise, and that *Buckley*'s approval of a \$1,000 contribution limit therefore does not control this case. Respondents have not remotely discharged this burden.

Since *Buckley*, this Court has never suggested that the appearance of corruption associated with unlimited contributions is a "conjectural" or "hypothetical" harm, nor has it required proof of this harm. Rather, the Court has consistently adhered to its common-sense holding that a system of unrestricted individual contributions to candidates inherently appears corrupt and thus undermines the public's confidence in the integrity of its representative government. In post-*Buckley* campaign finance cases, the Court has simply refused to find that the appearance of corruption inheres in *other* campaign activities, such as independent expenditures. Thus, although the record in this case demonstrates that Missouri did not rely on common sense alone in enacting its contribution limits, under *Buckley* and its progeny, empirical proof of the nexus between large campaign contributions and a public perception of corruption is not required.

That is why, while respondents and their supporting *amici* quibble over the adequacy of the State's evidence below, they are ultimately forced to argue that the public's perception of corruption is mistaken and thus cannot sustain the State's regulation. Respondents incorrectly assume that the sole manifestation of corruption is vote-buying, and then cite commentators who claim that such corruption does not exist and that public perceptions to the contrary are wrong. But the public also perceives that large contributions buy access, set the political agenda, and prevent consideration of government action. The State is entitled to address these ills even though they do not manifest themselves in concrete, provable acts.

Equally to the point, this Court has already rejected the argument that only *actual*, and not perceived, corruption can justify campaign contribution limits. Because *public* confidence in representative government lies at the heart of a healthy democracy, Missouri was entitled to enact legislation based on the views of its citizens, rather than the views of the more "sophisticated" commentators that respondents and their *amici* cite. Efforts to preserve the public's confidence in elected leaders, moreover, cannot be invalidated based on speculation that the State acted for improper reasons, such as protecting incumbents or equalizing political voices. Respondents' groundless insinuations amount, in the end, to the untenable argument that a State must suffer damage from actual corruption before it can address public concern over the integrity of its elected government. This is flatly inconsistent with *Buckley*, and more generally, it is not the law.

Respondents' arguments that Missouri's \$1,075 contribution limit is not narrowly tailored are likewise irreconcilable with *Buckley*. There, the Court held that the legislature has significant latitude when addressing the evils associated with unrestricted contributions, provided the limit it sets does not unduly burden associational rights or "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. The State demonstrated in its opening brief that its chosen limit is likewise entitled to deference, because it has only a marginal impact on First Amendment rights, affects only a minuscule percentage of those who contribute to candidates for statewide office, and has not hindered viable candidates from campaigning effectively.

Unable to rebut this showing, respondents assert that the limits are unconstitutional simply because \$1,075 is worth less in today's dollars than it was in 1976. But inflation alone does not establish that Missouri's limits are

"different in kind" from those the Court upheld in *Buckley*. Indeed, elsewhere in their brief, respondents concede that the "average Missourian" may well view \$1,075 in today's dollars as a "large" contribution. Resp. Br. 40. In fact, respondents' principal contention is that Missouri's limits should be deemed unconstitutional because Fredman's ability to raise money for his campaign, and Shrink PAC's ability to donate money directly to him, were burdened. But *Buckley* makes clear that contribution limits that have a modest impact on a particular candidate's ability to raise money are nevertheless lawful where, as here, they do not have a "severe impact on political dialogue" as a whole. 424 U.S. at 21. *Buckley* further holds that contribution limits only minimally burden the rights of speech and association of a contributor such as Shrink PAC. *Id.* at 20-22. Respondents' claims, therefore, provide no basis for withholding the deference otherwise due a legislature's judgment concerning the line between legal and illegal contributions.

ARGUMENT

I. NOTHING IN *BUCKLEY* OR THIS COURT'S SUBSEQUENT CASES REQUIRES MISSOURI TO PROVE THAT A SYSTEM OF UNRESTRICTED CAMPAIGN CONTRIBUTIONS CREATES AN APPEARANCE OF CORRUPTION.

In *Buckley*, this Court recognized that the primary interest served by the \$1,000 federal contribution limit was "the prevention of corruption and the appearance of corruption spawned by the real *or imagined* coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25 (emphasis added). The Court addressed these two harms separately and found that each justified the federal limit. The Court noted, first, that Congress had evidence from the 1972 elections demonstrating that the problem of actual corruption was "not an illusory one." *Id.* at 27.

"Of almost equal concern as the danger of actual *quid pro quo* arrangements," the Court continued, "is the impact of the appearance of corruption stemming from public awareness of the *opportunities* for abuse *inherent* in a regime of large individual financial contributions." *Id.* (emphases added). As to this harm, the Court required no evidence of the public's actual perceptions. Citing only the opportunities for corruption "inherent in a regime of large financial contributions," *id.*, the Court held that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.* (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)) (second omission in original).¹

Attempting to sidestep the "heavy burden" they would assume if they asked the Court forthrightly to revisit and overrule *Buckley*, as their *amici* do,² respondents euphemistically contend that the Court has "supplemented

¹ Respondents suggest that empirical evidence of a public perception of corruption may have been unnecessary in *Buckley* because Congress "had some evidence of [actual] corruption from which a perception of corruption could arise." Resp. Br. 34 n.19. Nothing in *Buckley*, however, suggests that an appearance of corruption arises only when there is evidence of actual corruption. Moreover, under the evidentiary standards that respondents advocate and the Eighth Circuit employs, the evidence of improper contributions described in *Buckley*, which ranged from "\$100,000" to "three million dollars," *id.* at 27 n.14, plainly would not suffice to show that donations of \$1,000 create an appearance of corruption. See *Carver v. Nixon*, 72 F.3d 633, 642 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996) (\$420,000 contribution to various state races was insufficient to show that donations of \$100, \$200 and \$300 created appearance of corruption).

² As the United States explains in detail, see U.S. Br. 21-30, respondents' *amici* completely fail to provide the "special justification." *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (internal quotation marks omitted), necessary to overrule *Buckley*.

Buckley” with a requirement that the government “‘demonstrate that [any] recited harms are real, not merely conjectural.’” Resp. Br. 26 (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995)). This argument is wrong. This Court has consistently recognized that the level of proof required to show that legislation addresses or will prevent “real” harm varies with the type of harm at issue. Some conduct is “inherently” harmful and the government need not await the occurrence of such harm before acting; in other circumstances, the government must prove that the conduct at issue will cause harm. In *Buckley*, this Court held that the harm caused by a regime of unlimited direct contributions to candidates for public office is of the first sort.

For at least two reasons, this Court’s determination that an appearance of corruption is “inherent in a system permitting unlimited financial contributions” is not the product of some outdated mode of constitutional analysis. *Buckley*, 424 U.S. at 28. *First*, the requirement that the government produce proof of “real harm” is simply not the post-*Buckley* innovation respondents claim it is. *Second*, this Court’s post-*Buckley* campaign finance cases continue to recognize the inherent risks of unrestricted contributions to candidates, and require proof of real harm only with respect to *other* campaign finance activities.

The Court’s conclusion that a regime of unrestricted campaign contributions inherently creates a public perception of corruption is not the product of a less rigorous brand of First Amendment analysis that was abandoned by the time of the plurality opinion in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994) (“*Turner I*”). Even before *Buckley*, this Court often rejected certain types of restrictions on political speech based on a State’s failure to prove that the particular restriction addressed a “real harm.” Thus, for example, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503,

508 (1969), the Court refused to allow a school district to punish students who had worn arm bands to protest the Vietnam war, noting that the State had produced “no evidence whatever” of the harm caused by the speech, and that, without any evidence of “actual or nascent” harm, the restriction could not stand. Similarly, in *Cohen v. California*, 403 U.S. 15 (1971), the Court rejected the State’s contention that appellant’s speech was inherently likely to provoke violence. The Court found that there was “no showing that anyone who saw Cohen was in fact violently aroused,” *id.* at 20, that there was “no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by [the appellant],” and that speculation about such harms was “an insufficient base” for the State’s restriction on speech, *id.* at 23. In *Williams v. Rhodes*, 393 U.S. 23 (1968), too, the Court rejected the claim that strict ballot access requirements were necessary to prevent voter confusion and to encourage political stability, concluding that there was no evidence substantiating these alleged harms, which appeared to be “remote” and “no more than ‘theoretically imaginable.’” *Id.* at 33. Thus, *Turner I* worked no sea change in this Court’s First Amendment jurisprudence.

Indeed, the *Turner I* plurality itself reflects the Court’s understanding that the nature of proof required still varies with the nature of the fact to be proven. There, the Court noted that the government was required “‘to adduce either empirical support or at least sound reasoning on behalf of its measures,’” *Turner I*, 512 U.S. at 666 (plurality opinion) (emphases added)—a statement completely at odds with respondents’ insistence that *Turner I* is a watershed event in First Amendment law that mandates empirical proof of all harms the government seeks to address. See also *United States v. National Treasury*

Employees Union, 513 U.S. 454, 473 (1995) ("Congress reasonably could *assume* that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate [an] appearance of improper influence") (emphasis added); *id.* at 475 ("[t]o justify suppression of free speech there must be *reasonable ground* to fear that serious evil will result if free speech is practiced") (emphasis added) (internal quotation marks omitted); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992) (upholding regulation of solicitation in airline terminals without proof of harm because "the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive"). Cf. *Edenfield v. Fane*, 507 U.S. 761, 774-46 (1993) (contrasting evidence needed to show harm from in-person solicitation by accountants with State's right to "'presume'" that in-person solicitation by lawyers is "inherently conducive to over-reaching and other types of misconduct'") (quoting *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 464, 466 (1978)).

More fundamentally, this Court, in the campaign finance decisions following *Buckley*, has never required fresh proof that unrestricted contributions create an appearance of corruption, and has instead continued to recognize this harm as self-evident. In *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), for example, the Court found that a restriction on the ability of unions and corporations to solicit funds used for political purposes was justified by the government's interest in preventing a loss of "public confidence in the electoral process through the appearance of corruption." *Id.* at 208. The Court required no proof of such a perception, and refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 210 (emphasis added). In numerous other cases, the Court has endorsed without reserva-

tion *Buckley's* recognition that unrestricted contributions create an appearance of corruption.³

There is only one sense in which the Court has "supplemented" *Buckley's* recognition of the inherent risks of unrestricted contributions: The Court has refused to assume that a public perception of corruption inherently arises from *other* campaign finance activities. Instead, the Court has required evidence that these different activities create a public perception of corruption. For example, in *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) ("*NCPAC*"), the Court struck down a restriction on independent campaign expenditures because there was no basis to believe such expenditures created the same risk of corruption that direct contributions to candidates create. The Court noted the "hypothetical[]" possibility

that candidates may take notice of and reward those responsible for PAC expenditures. . . . But here, as

³ See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297 (1981) (contribution limits are justified by "the perception of undue influence of large contributors to a candidate") (emphasis deleted); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) (campaign financing may be restricted to prevent "the appearance of corruption"); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring) ("the danger of either the fact, or the appearance, of *quid pro quo* relationship provides an adequate justification for state regulation of . . . contributions"); *id.* at 682 (Scalia, J., dissenting) limits are justified by the "substantial risk of corruption" that "plainly exists when . . . wealth is given directly to the political candidate") (emphasis added); *id.* at 702 (Kennedy, J., dissenting) ("campaign contributions are subject to greater regulation because of the enhanced risk of corruption from the *possibility* that a large contribution would be given to secure political favors") (emphasis added); *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 609 (1996) (noting the government's "'compelling'" interest in protecting the electoral system "from the appearance and reality of corruption"); *id.* at 648 (Stevens, J., dissenting) (limits "serve the interest in avoiding both the appearance and the reality of a corrupt political process").

in *Buckley*, the absence of prearrangement and coordination [between the PAC and the candidate] undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 498. *NCPAC* thus does not cast the slightest doubt on *Buckley*'s finding that the appearance of corruption is inherent in unrestricted contributions to candidates. Instead, *NCPAC* adheres to *Buckley*'s determination that this same risk does not inhere in independent expenditures, and that, for such expenditures, the risk must be proved. See *Buckley*, 424 U.S. at 46 (independent expenditures "do[] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions").

Similarly, none of the opinions in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*CRFCC*"), questioned *Buckley*'s holding that unrestricted contributions create an inherent appearance of corruption. Instead, members of the Court were divided about whether it is appropriate to assume, without empirical evidence, that independent expenditures by political parties create a public perception of corruption. The plurality struck down the restriction, explaining that "the absence of prearrangement and coordination" . . . "alleviate[s]" any inherent risk of corruption, *id.* at 616 (quoting *NCPAC*, 470 U.S. at 498), and that the government could "not point to record evidence . . . suggesting" that such expenditures created any "special corruption problem." *Id.* at 618. Three other members of the Court would have invalidated the restriction on coordinated expenditures by parties as well. In their view, "[t]he structure of political parties is such that the theoretical danger of those groups actually engaging in *quid pro quos* with candidates is significantly less than the

threat of individuals or other groups doing so," and the government had offered no evidence to the contrary. *Id.* at 646 (Thomas, J., concurring and dissenting).⁴ By contrast, the dissent believed that the appearance of corruption inheres in both independent and coordinated party expenditures, and that restrictions on both expenditures were constitutional. *Id.* at 648 (Stevens, J., dissenting).

In short, the Court has in some, though not all, post-*Buckley* campaign finance cases required the government to prove that activities *other than* direct contributions to a candidate pose a risk of real or apparent corruption.⁵ The Court, however, has consistently adhered to its prior determination that such a risk inheres in a system of unrestricted, direct contributions to candidates. Accordingly, Missouri was not required to prove this long-recognized and common sense truth.

II. THE APPEARANCE OF CORRUPTION IS A CONSTITUTIONALLY ADEQUATE JUSTIFICATION FOR CAMPAIGN CONTRIBUTION LIMITS.

Although Missouri was not required to demonstrate that unrestricted campaign contributions create an appearance of corruption, the State in fact made such a showing. While respondents and their supporting *amici* quarrel with the sufficiency of that showing, their real argument

⁴ In a portion of his concurrence that no other member of the Court joined, Justice Thomas advocated overruling *Buckley*'s distinction between contributions and expenditures. *CRFCC*, at 635-44. In so doing, however, Justice Thomas did not contend that unrestricted contributions do not create the appearance of corruption. Rather, he argued that, because some contributions are made for innocent reasons, a ban on all contributions is unduly broad. *Id.* at 642-44.

⁵ In *Michigan Chamber of Commerce*, 494 U.S. at 659-60, a case respondents simply ignore, the Court sustained a state prohibition on independent expenditures by corporations and unions without requiring any showing that the asserted harms arising from such expenditures were "real, not conjectural."

is that the appearance of corruption, standing alone, is a constitutionally inadequate justification for limiting campaign contributions. This argument is deeply flawed.

In the proceedings below, the State offered the affidavit of Missouri State Senator Wayne Goode, who explained that the Committee of the state legislature that proposed the limits explicitly considered the point at which contributions become unduly influential and “have the appearance of buying votes.” J.A. 46-47. The district court also could and did take judicial notice of the fact that an overwhelming majority of the electorate supported Proposition A’s lower contribution limits. App. 32a n.7. The district court properly viewed the vote on this initiative as the equivalent of a poll demonstrating the public’s perception that a \$300 contribution to a candidate for state office is large and that unrestricted contributions create political debts. The latter assessment was confirmed by numerous publicly-reported statements about large contributions to candidates for state office and about Proposition A, all of which decried the influence of “special interests” and “big money.” *Id.* at 31a n.6.

Respondents and their supporting *amici* ostensibly challenge the State’s showing, arguing that Senator Goode’s affidavit reflects only his own beliefs, rather than the public’s perception, Resp. Br. 37, and that the support for Proposition A “speaks as much to an attempt to redress perceptions of economic inequality as it does to any public perception of corruption.” *Id.* at 40.⁶ Yet,

⁶ Respondents also claim that Senator Goode’s statements are inconsistent with his vote for a 1995 measure that allowed candidates who had incurred campaign debts prior to enactment of Proposition A to accept unrestricted contributions in order to pay off such debts. Resp. Br. 38 & n.24. The bill in question, however, was a one-time measure passed to ameliorate the otherwise harsh consequences of Proposition A, which sets ceilings as low as \$100 on contributions to repay debt incurred at a time when no limits existed. The measure applied only to elections that had already

despite their insistence that this case turns on the sufficiency of the State’s evidentiary showing, respondents and their supporting *amici* effectively concede that the “average Missourian” may well view \$1,075 as a “large amount,” *id.*, and that most voters do, in fact, perceive large contributions to be corrupting. Thus, respondents characterize as “commonplace” the “assumption that campaign contributions are the dominant influence on policy-making,” *id.* at 41 (internal quotation marks omitted), and their supporting *amici* cite a recent public opinion poll that shows that, regardless of party affiliation, two-thirds of Americans “believe excessive influence of political contributions on elections and government policy is a major problem with the system,” more than half “believe political contributions often buy influence . . . for one group by denying another group its fair say,” and nearly half believe that contributions lead “elected officials to vote against their constituents’ interests.” Center for Responsive Politics, *Money and Politics Survey: Summary and Overview* (visited June 10, 1999) <www.opensecrets.org/pubs/survey/s2.htm>.

Once the smoke clears, respondents’ real argument becomes apparent—*i.e.*, that the public’s perception of corruption, standing alone, cannot justify restrictions on campaign contributions. According to respondents, “[c]ommon sense, as is the case here, may well be wrong,” because the perception that money corrupts ignores the teachings of scholars who have found “that ‘campaign contributions are made to support those politicians who already value the same positions as their donors.’” Resp. Br. 42 (quoting S. Bronars & J. Lott, *Do Campaign Donations Alter How A Politician Votes? Or, Do Donors Support Candidates Who Value The Same Things That They Do?* 40 J. L. & Econ. 317, 319 (1997)); see also

occurred, and allowed donations to individuals who had lost as well as to those who had won.

id. at 16-17 (“[a]ny public perception of corruption . . . is most probably wrong”). Senator McConnell likewise contends that “[t]wenty-five years of sophisticated economic, public policy, and social science literature shows *overwhelmingly* that legislative voting is driven by personal ideology, constituent desires and party loyalty, *not* political contributions.” McConnell Br. 18.

This Court properly rejected these arguments in *Buckley* and should reject them again here. In *Buckley*, the appellants argued that the “generally negative view of private campaign financing . . . finds little or no support in the works of scholars who have studied the subject over the last generation,” and that “contributions generally go to candidates already disposed to the donor’s point of view.” Brief of the Appellants at 56, 65, *Buckley v. Vaeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437). The health of a representative government, however, depends upon the views of the public, not those of scholars. The public, moreover, perceives that large contributions purchase not only votes, but also access, attention and services for select constituents, and an ability to influence the government’s agenda, including the power to keep certain items off that agenda. The truth of these very real public perceptions is not easily measured by scholars or commentators who dismiss public perceptions of vote buying.

As this Court has explained, legislation designed to prevent the appearance of corruption “‘is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials . . . engage in activities which arouse *suspensions* of malfeasance and corruption.’” *Crandon v. United States*, 494 U.S. 152, 165 n.20 (1990) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961) (emphasis added). Ac-

cordingly, in *Buckley*, this Court held that “Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’” 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)) (second omission in original); see also *National Right to Work Committee*, 459 U.S. at 208 (restrictions on the ability of unions and corporations to solicit funds used for political purposes was justified by the government’s interest in preventing a loss of “*public confidence* in the electoral process through the appearance of corruption”) (emphasis added).

Faced with the inescapable link between public perception and the health of a State’s electoral system, respondents seek to undermine the legitimacy of this justification for campaign finance regulation by insinuating that Missouri and other States will use the “appearance of corruption” standard to mask impermissible agendas, such as protecting incumbents, Resp. Br. 41, or redressing economic inequality in the political arena, *id.* at 43. In order to disable the State from protecting “the very fabric of a democratic society,” however, respondents and their *amici* must offer more than unsubstantiated speculation that the State has acted for improper reasons.

In this case, for example, respondents and their *amici* suggest that Missouri’s limits “reflect incumbent ‘self-dealing.’” McConnell Br. 13; see also Resp. Br. 41. Their claim, however, is belied by the fact that Missouri *citizens* adopted the even stricter limits of Proposition A. More fundamentally, as this Court has already held, the impact of contribution limits in any given election will depend on a host of factors that do not “invariably and invidiously benefit incumbents as a class.” *Buckley*, 424 U.S. at 33.

Similarly, in the absence of evidence of actual *quid pro quo* arrangements, the public's perception that large contributions buy undue influence can always be characterized—and then dismissed—as a disguised attempt to equalize political voices. By their very nature, “large” contributions will be made only by a small elite, and the majority of voters, unable to contribute at these levels, will naturally perceive that certain measures are passed or defeated and that certain constituent services and access are delivered or refused due to the financial leverage of large contributors.⁷ To argue, as respondents do, that this perception is in reality a constitutionally impermissible desire to mute the voice of wealthy contributors is simply to argue again that the appearance of corruption cannot justify contribution limits. This Court rejected that argument in *Buckley*,⁸ and properly so: a State need not wait until the public's confidence in its representative government has actually been undermined by real or perceived corruption before the State can act to prevent such dam-

⁷ Respondents contend that the elite group of contributors who gave more than \$2,000 in two 1992 races could not cause any “‘real harm’” because their contributions covered only a small percentage of state-wide candidates' expenditures. Resp. Br. 37. But these facts reinforce the legitimacy of Missouri's efforts. The tiny number of “large” contributors will stand out from the sea of “small” contributors who contribute to a statewide campaign for public office. For example, Missouri's law addresses the perception of corruption that would arise if a candidate like respondent Fredman had been elected with substantial financial support solely from respondent Shrink PAC and then engaged in conduct that had benefited Shrink PAC.

⁸ Indeed, in *Buckley* itself, the government defended the \$1,000 contribution on the grounds that it prevented real and apparent corruption and equalized the ability of individuals and groups to affect the outcome of elections. *Buckley*, 424 U.S. at 25-26. The Court, however, nowhere questioned the *bona fides* of the “appearance of corruption” rationale, and did not conduct a searching review of evidence of the public's perceptions in order to ensure that Congress was not using this rationale to “mask” the impermissible goal of “equalization.”

age. Cf. *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (State need not demonstrate actual voter intimidation and election fraud to justify “campaign-free” zone around polling place, because such a requirement would improperly require “‘that a State's political system sustain some level of damage before the legislature could take corrective action’”) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

III. BECAUSE MISSOURI'S LAW IMPOSES MINIMAL BURDENS ON FIRST AMENDMENT RIGHTS, THE LEGISLATURE'S JUDGMENT ABOUT THE PRECISE LIMIT IS ENTITLED TO DEFERENCE.

In *Buckley*, the Court concluded that a “\$1,000 contribution limitation focuses precisely on the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources,” 424 U.S. at 28, and allowing candidates to conduct effective campaigns. Critically here, the Court rejected the argument that the limit was “unrealistically low,” and held that “[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000.” *Id.* at 30 (internal quotation marks omitted) (alteration in original). “Such distinctions in degree,” the Court explained, “become significant only when they can be said to amount to differences in kind.” *Id.*

In its opening brief, the State demonstrated that its contribution limits address a compelling public interest and have only a limited impact on First Amendment rights, because they affect only a very small percentage of contributors and do not prevent candidates for statewide office or the political committees that support them

from raising sufficient sums of money to conduct effective campaigns. *Buckley* makes plain that when a legislature's chosen limit has such modest effects, the legislature's judgment about precisely where to draw the line between legal and illegal contribution is entitled to significant judicial deference. 424 U.S. at 28.

Respondents entirely fail to address this showing. Instead, they claim that Missouri's limits are unconstitutional simply because \$1,075 is worth less in today's dollars than it was in 1976. In *Buckley*, however, the Court nowhere suggested that \$1,000 was the minimum, constitutional contribution limit. As noted above, moreover, respondents acknowledge that, even today, the "average Missourian" may well view \$1,075 as a "large" contribution. Resp. Br. 40. And respondents do not even attempt to show that Missouri's laws prevent candidates for statewide office from conducting substantial and effective campaigns.⁹

Instead, respondents complain that, even if Missouri's limits do not generally burden First Amendment rights, they significantly burdened Fredman's candidacy and Shrink PAC's right to associate itself with Fredman's candidacy and thus cannot be considered narrowly tailored. First, limits do not seriously restrain political

⁹ Respondents speculate that campaign expenditures in 1996 (post-limits) compare favorably to campaign expenditures in 1992 (pre-limits) solely because candidates in 1996 obtained money from less regulated sources, such as political party committees. Resp. Br. 24. But a review of publicly available disclosure reports that the State is lodging with the Court reveals that in each of the 1996 statewide races, contributions from political party committees accounted for less than five percent of the total expenditures in that race. The newspaper article cited by respondents, Jo Mannies, *Laws Shift Flow of Money to Political Parties*, St. Louis Post-Dispatch, Aug. 1, 1996, at 5B, does not state otherwise. It merely notes that contributors were donating more money to parties which, in turn, made larger independent expenditures. That increase simply is not relevant here.

communication simply because they hinder the campaign of a single, marginal candidate. Fredman's speech was in no way restrained; his claim is instead the attenuated one that he was not able to receive additional money from a single donor and "did not have time to raise the seed money necessary for his statewide campaign by asking a large number of contributors for small contributions." Resp. Br. 6. But the requirement that Fredman take the time to do so does not violate his First Amendment right to speak. *Buckley* makes clear that where, as here, viable candidates are able to raise money sufficient to campaign effectively, contribution limits are lawful. See 424 U.S. at 22 (explaining that candidates do not have a constitutional right to raise money in large lump sums)¹⁰

Similarly, *Buckley* expressly holds that a contribution limit does not unduly burden a contributor's right to associate with a candidate. Many alternative ways of associating with a preferred candidate and other supporters of that candidate remain available. An individual may volunteer, may join a political association, and may independently expend unlimited amounts of money promoting a candidacy. Reasonable limits such as those enacted by

¹⁰ Respondents wrongly suggest that Missouri's \$1,075 limit on Shrink PAC's contributions to Fredman should be compared not to the \$1,000 federal limit on contributions by individuals and most groups, but rather to the \$5,000 federal limit on contributions by multicandidate committees that register and meet certain other requirements. Resp. Br. 46-47. Of course, Shrink PAC does not meet the requirements necessary to make a \$5,000 contribution, and *Buckley* expressly upheld the federal act's provisions limiting some committees to \$1,000 contributions (to prevent individuals from circumventing the restrictions on individual contributions by deeming themselves committees) and others to \$5,000 contributions. 424 U.S. at 35-36. As explained in text, *Buckley* clearly refused to embroil the courts in questions of fine-tuning once it upheld the legislative judgment that some limits on contributions to candidates are constitutional.

Missouri only minimally burden Shrink PAC's right to associate with Fredman.

In sum, in light of the minimal burden Missouri's limits place on First Amendment rights, *Buckley* appropriately requires courts to defer to the Missouri legislature's judgment about precisely where to draw the line between legal and illegal contributions to candidates.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

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No. 98-963

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN, and JOAN BRAY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

**SUPPLEMENTAL BRIEF FOR RESPONDENTS
SHRINK MISSOURI GOVERNMENT PAC
AND ZEV DAVID FREDMAN**

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**SUPPLEMENTAL BRIEF FOR RESPONDENTS
SHRINK MISSOURI GOVERNMENT PAC
AND ZEV DAVID FREDMAN**

Respondents Shrink Missouri Government PAC and Zev David Fredman submit this supplemental brief, pursuant to Rule 25.5 of the Rules of the Court, to present a late authority, *Greater New Orleans Broadcasting Association, Inc. v. United States*, 119 S. Ct. 1923 (1999), which the Court decided on June 14, 1999, seven days after respondents filed their brief.

1. The Court's recent decision supports respondents' argument that Missouri must demonstrate that campaign contribution limits address some "real harm." Resp. Br. 28-29. The Court noted that the government cannot carry its burden of justifying a restriction on commercial speech "by mere speculation or conjecture"; instead, it "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broadcasting Association, Inc.*, 119 S. Ct. at 1932 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)).

2. The Court's recent decision also supports respondents' argument that the real harm requirement is necessary to "smoke out" the risk that Missouri has burdened political speech for unconstitutional purposes. Resp. Br. 48 (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)); see *id.* at 47-49.

a. The Court stated that the requirement that government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" is "critical." *Greater New Orleans Broadcasting Association, Inc.*, 119 S. Ct. at 1932 (quoting *Edenfield v. Fane*, 507 U.S. at 770-71 and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)).

b. Absent some evidence of real harm, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Greater New Orleans Broadcasting Association, Inc.*, 119 S. Ct. at 1932 (quoting *Rubin*, 514 U.S. at 487, quoting *Edenfield*, 507 U.S. at 771).

c. Similarly, absent some evidence that corruption or the appearance of corruption is a real harm, Missouri "could with ease restrict [political] speech in the service

of other objectives"—leveling the playing field, protecting incumbents, or merely pandering to popular fears—"that could not themselves justify a burden on [political] expression." *Id.*

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ZEV DAVID FRIEDMAN and JOAN BRAY,
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On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

**BRIEF OF *AMICUS CURIAE*
PUBLIC CITIZEN URGING REVERSAL**

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INTEREST OF THE AMICUS¹

Public Citizen is a non-profit advocacy organization founded in 1971 with approximately 150,000 members throughout the United States. For many years, Public Citizen has devoted substantial resources to trying to limit the influence of money on elections. To that end, it has sought to ensure that the limitations on contributions to political candidates are set at levels which do not result in the appearance that campaign contributions can purchase votes on legislation or on other official acts, while at the same time the amounts are set high enough to enable those who seek elected office to raise sufficient funds to run a competitive race.

As a result of its work in both the legislative and litigation arenas on this issue, Public Citizen has concluded that there is no single answer to the question of what is an appropriate contribution limit that would apply to all election races in all states. Thus, to the extent that this case may be seen as a vehicle to answer that question, Public Citizen has a strong interest in seeing that the Court resolves it in a way that does not create a nationwide solution that fails to take into account the circumstances, preferences, and historic election practices of each jurisdiction.

This case is also significant for Public Citizen because of the opportunity it affords the Court to provide substantial

¹ Letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, *amicus* states that no party had any role in writing this brief and that no one other than *amicus* made a monetary contribution to its preparation or submission.

guidance to legislatures and the lower courts in dealing with campaign finance issues. While the discussion in *Buckley v. Valeo*, 424 U.S. 1 (1976), is a useful starting point that sets the outer parameters for the debate, the lower courts and the legislatures need further guidance on how to deal with a number of issues that are raised in this case. If only the fate of the Missouri statute were at issue, Public Citizen would leave its defense to the parties, whose briefs clearly show that the court of appeals overstepped its proper role when it held the limits to be unconstitutional. But because the Court's decision is likely to have an impact far beyond the four corners of the Missouri statute, Public Citizen is filing this brief (with the consents of the parties) to set forth its views on how the issue should be approached in this and in future cases.

In analyzing the constitutional issue presented, this brief will discuss a number of policy options (such as automatic cost of living increases for contribution limits, or different limits within a jurisdiction for the same race, based on different conditions). Our discussion of constitutionally permissible alternatives should not be seen as a policy recommendation by Public Citizen that they be adopted, any more than the absence of any discussion of a public funding option, like that recently adopted by the States of Maine, Massachusetts, and Arizona, and used in Presidential elections, should be construed to mean that Public Citizen has abandoned its long-time support of that means of eliminating the appearance of corruption and assuring adequate funding of elections. The only questions presented here are the constitutionality of certain options chosen by Missouri, not their wisdom, which is for the legislative branch of government to decide.

SUMMARY OF ARGUMENT

Although this is a First Amendment challenge, this Court made it clear in *Buckley* that the Constitution does not forbid the government from setting reasonable limits on the size of contributions to candidates for elected office. *Buckley* also made it clear that the Court will not substitute its judgment for that of the elected legislature. Thus, while this Court did not eliminate all judicial review of contribution limitations, nothing in *Buckley* or any other opinion of this Court changes the basic rule that laws passed by democratically-elected legislatures are presumed constitutionally valid, and that the burden is on those challenging a law to establish their invalidity. Indeed, if contribution limits are alleged to limit the ability of candidates to raise the money needed to run for office, challengers should face a particularly uphill battle to convince a court that the legislators who write those laws have created limitations that hinder their own efforts at re-election, which is, in essence, what respondents allege.

Other aspects of the decision below demonstrate that the court of appeals improperly substituted its judgment for that of the Missouri legislature. Nothing in the First Amendment requires that a state set contribution levels with mathematical precision, nor that one jurisdiction slavishly follow what another has done. Thus, an amount that may be perfectly acceptable for one race, in one locale, may suggest to citizens in another state that a contribution of that size is the equivalent of buying the candidate's vote. Similarly, the amount needed to run for Governor in New York is almost certainly irrelevant to the determination of what funds are needed for a state assembly race in North Dakota, and vice-versa. The job of the legislature is to achieve a proper balance between banning contributions that give rise to the appearance of corruption, while not setting

contribution limits so low that candidates for elected office -- particularly challengers -- are unable to raise enough money to have a realistic chance to prevail. It is not the job of the courts to pass on those balances *de novo*.

On the appearance of corruption side of the ledger, courts should be extremely reluctant to substitute their views for those of the legislature. Not only is a judgment on that issue a peculiarly local matter, but questions relating to the appearance of corruption are not capable of judicial verification by the use of any kinds of data, whether local, regional, or national. Furthermore, it is singularly inappropriate for life-tenured federal judges to second-guess the elected representatives of a state on how large a contribution to a candidate for office must be to suggest to the people of that state that the candidate is being bought, or at least rented until the next election. Furthermore, if legislators vote for a contribution ceiling on the grounds that allowing larger donations would raise the appearance of corruption, they are unlikely to set that limit so low as to call into question their own prior or future practices of accepting similar amounts.

The other part of the balance does not focus on the interest of the person who seeks to make larger contributions, but on the ability of the candidate to raise sufficient funds to compete. As this Court recognized in *Buckley*, the First Amendment interest in writing a check to a candidate is a lesser one than in spending that same amount of money in making a public statement of support for that same candidate. 424 U.S. at 21. Moreover, if a donor has given the maximum allowed by law, she or he can still support that candidate by making unlimited independent expenditures, by donating time and energy as a volunteer, and by contributing to political committees and parties who may also support that candidate.

Thus, while would-be donors may have standing to challenge contribution limits, the Court should be loathe to accept their claims that the recipients of their greater largesse are being severely handicapped by the lower limits, unless there is a candidate making a credible challenge, backed by evidence and not merely conclusory assertions, that the limits interfere with that candidate's ability to run for office.

We do not suggest that the First Amendment would be satisfied if the courts simply rubber-stamp whatever limits legislatures enact. Rather, our position is that a plaintiff must initially show that contribution limitations create a substantial burden on the ability to run a competitive race. But even then, if the legislature carefully considers relevant factors, such as those outlined below, the courts should not overturn a judgment as to the proper level for political contributions except in the most extraordinary circumstances, such as where the legislature blatantly disregarded clearly relevant evidence in a manner that leads the court to conclude that the First Amendment had been effectively written out of the legislative calculus.

ARGUMENT

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld the government's right to impose limits on contributions to candidates for elected office on the ground that there was a significant interest in preventing the appearance of corruption, as well as actual corruption. At the same time, it ruled that the First Amendment prevented the government from limiting the total amount of money that candidates for office could spend, either from their own funds or from funds lawfully raised from others. In rejecting the argument that the expenditure ceiling was needed to prevent the appearance of corruption, the Court assigned that role to contribution limitations. *Id.* at 55. This

case raises the question of the degree to which federal courts will scrutinize legislatively-enacted contribution limits and the factors to which the legislature and the courts should look when enacting or reviewing those limits.²

We begin with an obvious, but necessary point. Drawing numerical lines is not an ordinary activity in areas in which the First Amendment provides the jurisprudence, and therefore there is little authority on how a legislature should set precise contribution limits, and less guidance on how the courts should review what the legislature has done. But certain elements cannot be disputed: legislative line-drawing is inevitable; other lines, close to the one chosen, would also be defensible; and reasonable legislatures will arrive at different conclusions based on the same or similar facts. As this Court observed in upholding a statute allowing a municipality to charge up to \$300 for the expenses of policing a parade, over an objection that only a flat fee is permitted by the First Amendment, "we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought." *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941).

² Missouri's limits were enacted by its legislature, although it had prior limits that were enacted through an initiative. Because of the differences between the processes by which initiatives and ordinary legislation become law, this brief will address only the latter, and we urge that the Court expressly limit its opinion to the judicial review of legislatively-enacted contribution limits, although the factors that go into setting limits in both contexts are the same.

On the other hand, the First Amendment does not allow either legislatures or the courts to disregard the impact of contribution limits simply because there may be an appearance of corruption that is sought to be eliminated. However, because the process of line-drawing is essentially one of predictive judgment, if a legislature properly considers relevant factors, the courts should give those judgments great, although not total, deference when specific limits are challenged as being too low. Indeed, even in a case in which this Court applied an intermediate level of scrutiny, it accorded legislative, predictive judgments, such as those involved in this case, substantial deference, because Congress was better equipped to make those judgments, it has the relevant expertise, and "out of respect for its authority to exercise the legislative power." *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 520 U.S. 180, 195-96 (1997).

Stated another way, if the legislature follows a reasonable process, the limits chosen are reasonable, and the basis for setting those limits is reasonably clear, the First Amendment does not permit the courts to review those conclusions *de novo*, let alone to substitute their judgments for those of the elected legislature. As this Court's decisions make clear, there is no constitutional mandate for a legislature to engage in "fine tuning," and the courts have "no scalpel to probe, whether, say, a \$2,000 ceiling might serve as well as \$1,000." *Buckley, supra*, 424 U.S. at 30 (internal quotations omitted). "Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.*

Under *Buckley*, there are two basic questions in setting a proper contribution limitation: what amount would be seen to raise an appearance of corruption, and will that amount so restrict the ability of candidates (or at least a major subset of

candidates) to raise sufficient funds to run a competitive race? But in answering those questions, nothing in *Buckley* changed the basic constitutional norm that legislative enactments are presumed valid, and that the burden is on the challenger to prove that the law violates the Constitution, even in a First Amendment case. With that in mind, we deal with these two questions in turn and then discuss the ultimate balancing process by the legislature and the review of that balance by the courts.

A. The Appearance of Corruption

This Court has made clear that the government is not limited to outlawing actual bribery, and thus the appearance that a candidate's vote can be purchased by large contributions will suffice. *Buckley, supra*, 424 U.S. at 27. There is, of course, no universally accepted "corruption meter" that somehow measures the popular reaction to different contribution limits and finds precisely where the appearance of impropriety hits an unacceptable level. This is true within small communities, and it is even more true the wider the audience that is being asked. Nonetheless, there are some factors to which a legislature might properly look in arriving at its judgment about appropriate contribution limits.

For example, if a typical contest for state assembly costs \$25,000, while a race for the senate seat that covers three times as many constituents costs \$100,000, it would be entirely permissible for a legislature to conclude that a smaller donation for the assembly race would be more likely to "buy influence" than the same donation in a senate race. Thus, the legislature could conclude that the appearance of corruption should be weighted differently for different races (as Missouri has done). However, because of the necessity to assure that campaigns are

adequately funded, including the ability of candidates for particular offices to raise money for their races, a state is not compelled by the First Amendment to set different limits for different races, let alone to set them so that there is a direct mathematical correlation between the amount of money spent in each race and the contribution limits for that race.

Similarly, a legislature could properly take into account traditional levels of donations in a given location. For example, if races had historically been run in which almost no one gave more than \$100, a limit at that level in that locale might well be seen as an appropriate point at which the appearance of corruption might arise, but wholly inappropriate in places with very different traditions. The same kind of approach might justify lower limits in determining what constitutes an appearance of corruption in rural communities, where there is relatively little disposable income, in contrast with New York City or Hollywood, although the Constitution does not mandate such a differential. And surely a legislature could take into account the fact that 95% or even 99% of the voters would lack the capacity to make a contribution of more than \$1000 in deciding whether larger gifts than that would raise the specter of influence buying. Given the subjective nature of the "finding" that a certain contribution amount raises an appearance of impropriety, the courts should be extremely reluctant to second-guess this aspect of fixing the contribution level. In our view, to the extent that judicial scrutiny of contribution limits is appropriate at all, it should be directed to the other element of the balance -- whether the limit unduly interferes with the ability of candidates to run for office.

B. The Degree of Interference With Fundraising.

In assessing this aspect of the problem, there are two

groups of persons whose interests might be relevant -- donors and candidates -- but only the latter are of significant constitutional concern. To be sure, donors are affected since they cannot give as much as they would like to the candidate of their choice, although they can give as much as anyone else, and hence they cannot be criticized for showing too little support for the candidate. Moreover, they are also permitted (within the limits of the law) to make contributions to political committees and parties that are likely to support that candidate. Finally, they can continue to exercise their First Amendment rights by making *unlimited* independent expenditures on behalf of that candidate. For those reasons, and because, as *Buckley* correctly recognized, the additional speech value in making larger donations is rather attenuated, 424 U.S. at 21, the focus of the First Amendment concern is not with the donor, but with the candidate, for whom the question is: will the limits on per person donations make it very difficult, if not impossible, to raise the money needed to run a competitive race?

This case involves a challenge by a single candidate for State Auditor and by a political committee that wished to contribute more than the law allows to that candidate for that office. While we believe that persons who claim that they would make larger contributions if the law allowed (as perhaps they did before the limit was lowered) have Article III standing to test the constitutionality of contribution limits, the focus must be on the candidate and on the race for a particular office. Thus, in this case, the proper inquiry is whether the existing limits unduly impede one running for the office of State Auditor and not for some other office (such as Governor) for which the limit is the same, nor for other offices that have different contribution limits.

Not only does the law of standing require that the focus of the challenge be so limited, *Lewis v. Casey*, 518 U.S. 343, 357-60 (1996), but the evidence of inability to run for a specific office relates to that office, and a candidate is obviously in the best position to offer specific proof of the barriers that the statute creates. Here respondent Friedman's principal "evidence" is his bare bones assertion that the contribution limits "prevent me from marshaling sufficient assets to conduct a meaningful statewide campaign for the office of Missouri State Auditor and from expressing my political opinions to the Missouri electorate, and they severely burden political dialogue on the issues raised in the campaign for Missouri State Auditor." JA 10, ¶4.³ Those are the conclusions that might support a finding of unconstitutionality, but they are surely not evidence from which a court might properly reach that result. Accordingly, there is no factual basis for the claims as to the State Auditor's race, which is the only office for which there is a candidate and for which there is a person who seeks to

³ Nothing is added by a statement of the amount that one candidate spent running for State Auditor in 1994, or by respondent's claim that he does "not have time to raise the seed money necessary for my statewide campaign by asking a large number of small contributors for small contributions [but] must, instead, depend on contributions of more than \$1075 made by plaintiff PAC and others." JA 11, ¶¶ 8 & 9. Similar conclusory statements by respondent PAC (JA 14, ¶¶ 8 & 9) do not fill the evidentiary void. Indeed, Mr. Friedman raised a total of only \$4750 (JA 54, ¶ 5), suggesting that the \$1075 contribution limit was not a real factor in his fundraising problems.

contribute more for that office than the law currently allows.⁴

Assuming that there is a proper challenge to a limit applicable to a particular office, there are no definitive answers to the question of how much money is enough. But unlike the inquiry on the appearance of corruption, data may provide more help in answering this question. Thus, in most jurisdictions -- even those with only disclosure requirements -- there will be information as to the amounts spent in campaigns and the amounts given by the largest contributors. With that information, legislators would be in a position to calculate how many people, and how many dollars, might be affected by setting the contribution level at a given amount. Of course, the legislature need not assume that every dollar of prior contributions that exceeds a particular level will automatically be lost forever. Smaller donors may increase their gifts, and new donors may be cultivated. At some point, the amount of time and money needed to recapture lost revenue may be so great as to foreclose the realistic possibility of making up the difference, but that is likely (but not certain) to apply to all candidates, in which case there will still be competition.

⁴ Paragraph 5 of the Friedman affidavit suggests that the case may be moot because the 1998 election was "a special opportunity" since the incumbent was not seeking re-election. JA 10. However, because the record is not clear on mootness, and because the court of appeals decided the case after the primary was held in which Mr. Friedman garnered only 20% of the vote (JA 55, ¶ 11), this Court should reach the merits and, if a remand is required, have the district court pass on mootness as the initial issue. *Helling v. McKinney*, 509 U.S. 25, 35-36 (1993).

Nor must a legislature use higher individual contribution limitations to assure that all the candidates in a given race are able to raise equal amounts of money. In the first place, no matter what level is set, some candidates will always raise more money than others -- generally the incumbent, but not always; there are simply too many factors that go into a successful fundraising campaign in an election race to attribute much of a role to contribution limits, at least within some fairly broad range. Second, it is essential to take into account funds that are available from political parties, as well as, in some jurisdictions, corporations, labor unions, and political committees. Third, in order for a race to be competitive, the candidates need not have identical warchests; rather, there are certain amounts that are needed to have a realistic chance, but once they are met, the money differential often is not the dispositive factor. Of course, more money is almost always a strong asset, especially to have in reserve in case it is needed at the last moment, but strict equality is not a *sine qua non* for a competitive race.

Finally, equality or even substantial superiority in fundraising does not always assure victory. Thus, according to a new study by the Research and Policy Committee of the Committee for Economic Development, a prominent organization of business leaders and educators, seven of the nine challengers who defeated House or Senate incumbents in 1998 spent *less* money than the incumbent, and a survey of 1540 House races from 1976 to 1990, "concluded that, while money is essential, challengers do not as a rule have to spend as much as incumbents to win." *Investing in the People's Business*, 17 (1999); see also *Buckley*, 424 U.S. at 32 (reporting similar conclusions from earlier races).

The Missouri law is apparently based on the premise that some races will cost more than others because it sets higher contribution limits for them. But there is no necessary mathematical correlation between the amounts spent in races for different offices and the separate contribution levels for each. Depending on other factors, a legislature could set a single contribution limit for all races -- as Congress did for federal elections -- and still not violate the First Amendment, as this Court held in *Buckley*. Thus, if the legislature concluded that, although state senate races were more costly than assembly races, the broader base of voters and/or the heightened interest in senate races, because of the smaller number of members in that body, made it possible to raise the needed funds even with the lower cap, that would be constitutionally acceptable. Missouri's law, which has different levels for different races, should pass muster.⁵

⁵ A variation on this issue relates to the constitutionality of the identical limit for races for the United States Senate where there are substantial variations in the populations of the different states. One reason for the common limit is that Senate races in the smaller states attract larger numbers of out-of-state contributors since, once elected, all Senators have the same vote. Indeed, Senators from smaller states may be less vulnerable to challengers than are those from New York or California, and hence the years in which there are competitive races in those smaller states may result in even larger out-of-state "investments" in the election. We offer this illustration to underscore the danger of using the mathematical approach followed by one of the court of appeals judges below. In addition, to decide this issue would require a full record in the district court in showing the impact on a candidate for United

(continued...)

A state might find, for example, that the need to use expensive media in certain locations, but not others, resulted in a wide variance in the cost of running for the same office within the state. In that situation, the state could, but would not be required to, have different contribution limits for those places with higher costs. Any such differential would not have to be based on the exact ratio of the higher cost to the lower cost races, but need only be set at a level that the state concludes is sufficient to allow candidates to run competitive races. In addition, a state could also deal with the problem of disparate costs by setting the ceiling at some intermediate level, so long as it did not unduly hamper candidates in the more expensive races. Stated another way, the legislature is not required to set the contribution limitation at the highest level -- to eliminate any possibility that high cost races would be underfunded -- nor is it required to choose the lowest level -- to be certain that all traces of an appearance of corruption are rooted out. The touchstone is the actual impact of the limitation on the ability to run for elected office.⁶

⁵(...continued)

States Senate and the justification for the limit chosen before deciding the legality of *any* contribution limit. Moreover, since elections for members of a state's legislative body are for units with approximately equal populations, the issue for races for the United States Senate can never arise at the state level. Issues relating to unequal costs of races for similar offices within a state, caused by other factors, are discussed *infra* at 14-15.

⁶ For simplicity, this brief has used the costs of actually running, but there are many refinements or alternative measures that a state could properly use, but should not be required to

(continued...)

In many cases it will be argued, as it is here, that the size of voting districts and the costs of running do not remain constant over the years. To be sure, a state cannot ignore these facts as part of the mix, but that does not mean that the First Amendment requires that states automatically escalate their limits by an amount equal to the highest of (i) the increase in the CPI, (ii) the average cost of races in the state, or (iii) the percentage change in the number of voters. For example, more voters may mean higher costs, but that may also result in more people who are willing to contribute and/or make larger donations. Similarly, the costs of races may escalate not out of necessity, but because candidates are successful at raising more money. Where the state explores these factual questions, the federal courts should be extremely reluctant to overturn reasoned conclusions about any of them.

⁶(...continued)

follow. For example, using only contested races would be permissible, but not obligatory, as would eliminating from the mix those aberrant races in which one candidate's personal wealth raised the cost far beyond the typical election. States also should be able to take into account the primary selection process in a way that is appropriate for their election systems, rather than having a single mandate imposed by the federal courts. Similarly, as an alternative to historic costs, a state might base its limits on the number of citizens, registered voters, or actual voters in recent races. Stated another way, the Court should not impose a "one size fits all approach" for an issue that has strong and legitimate reasons for local variance, particularly when the ultimate questions do not admit of precise answers, no matter which approach is selected.

A state could, as Missouri has done, choose to incorporate automatic increases in contribution limits based on the cost of living or some other objective measure. Such an approach would respond to the argument that existing limits are no longer reasonable, but the failure to include an automatic adjustment of some kind is not alone grounds for striking down a contribution limit, any more than the failure to include any other specific adjustment or factor described above is always fatal; the burden remains on the challenger to prove that the limits in effect significantly impede the ability of candidates to run competitive races for that elective office. Automatic adjustments based on the CPI or other factors, such as the average cost of campaigns or increases in the voting population, are simply one among many possible means to assure that the ability to run a competitive race is not eroded by changes in circumstances. However, a legislature could quite properly reject automatic adjustments of any kind if it concluded that exceeding current levels would raise an appearance of corruption and that other means were available to assure that races were adequately funded.

Moreover, although not required to do so by the Constitution, a state might choose to review existing contribution limits from time-to-time to assure their continued validity. But regardless of what the state decided to do, even in a challenge to a contribution limit that was set many years earlier, the ultimate burden of establishing that the limits were unconstitutional would still be on the plaintiff.

A further factor that both legislatures and courts should consider is the possible disparate impact that particular limits may have on incumbents and challengers. In *Buckley*, this Court expressed concern that, since incumbents set expenditure limits, they do so at levels at which it is much more difficult for

challengers to overcome the inherent advantage of name recognition that goes with incumbency. 424 U.S. at 56-57. The same potential exists on the contribution side, although there is at least some basis for concluding that incumbents believe they are better off with higher limits because it will be easier for them to raise larger sums than it will be for their opponents. On the other hand, it can be argued that challengers need to be able to raise relatively large amounts of money quickly, and the only realistic way to do that is with a smaller number of large contributions.

We do not believe that there is an answer to this question that would apply to all races in all places, now and for the future, since, like many other aspects of this issue, we are dealing with predictive judgments that are the most difficult to "prove" if this Court were to require that. We do not, however, suggest that the possible impact of the incumbency advantage may be overlooked by either the legislature, which should include it as one factor in its deliberations, or by the courts.⁷

There is one final point that should be obvious, yet seemed to be overlooked by the court of appeals in this case. The determination of the amount reasonably needed to fund a competitive race is not a single number applicable to all races

⁷ Among the many concerns about the current system of campaign finance are the time and money spent by candidates (both incumbents and challengers) raising money, rather than discussing issues. A state may, but is not required to, take these factors into account in setting a higher rather than a lower contribution limit, on the theory that it takes less time and money to raise a given sum in larger contributions than in smaller ones.

in the United States, even those involving approximately the same number of voters. Thus, the fact that this Court approved a \$1000 limit for federal races in *Buckley* does not mean that Missouri must adhere to the federal model in setting its limits. As we have tried to show, the proper contribution level is a quite individualized determination that may not even apply throughout a state, let alone across state borders or between federal and state campaigns.

This is not to say that levels used and/or approved by the courts in one state are irrelevant in another; rather, they are relevant only if conditions are similar. Thus, if legislature A determines that the election conditions in state B are generally similar, and it adopts those limits, that should give the courts some comfort. On the other hand, if legislature A concludes that, despite surface similarities with state B, the elections there are conducted in a very different way, with very different levels of funding, the failure to follow state B is not only not a danger signal, but a positive indication that state A has given the issue the kind of consideration that the courts should approve. Therefore, the fact that Missouri in 1996 chose different contributions for its three categories of elections than Congress chose for federal elections in 1974 is of no significance, absent a showing that the manner in which the two sets of elections are conducted, and the multitude of other conditions affecting the two sets of elections, reasonably approximate one another.

C. Making the Judgments

Like all challenges to legislative determinations, the burden is on the plaintiff to show that the presumption of constitutional validity is overcome, in particular by showing that the limitation being challenged imposes a severe restriction on the ability of candidates to run for office. This Court held

in *Buckley* that *some* limits on contributions are constitutional, and thus the question in each case is whether the limits before the Court are consistent with *Buckley*. That process involves judicial review of the judgments made by the legislature on two separate issues: what is the level at which concerns about the appearance of corruption arise, and what level of contributions is needed to assure that challengers and incumbents have the ability to raise the money needed to run a competitive race? The legislature might or might not have considered the factors discussed above in reaching its conclusion about the proper limits, but the "list of factors [is] meant to be helpful, not definitive." *Kuono Tire Co. v. Carmichael*, ___ U.S. ___, No. 97-1709, Slip op. at 11, 67 USLW 4179, 4183 (March 23, 1999). In the end, no matter how carefully the legislature undertakes its task, no one should be fooled into thinking that a mathematically exact answer can ever result since so much of what is being decided are questions of predictive judgment.

Since the challenger has the burden of establishing the invalidity of the contribution limits, the court may not conduct a trial *de novo*. Rather, it should only assure itself that the legislature made a good faith effort to consider relevant factors and that it dealt with them in a non-arbitrary way. And where the legislative process includes a thorough review of the relevant factors and specific explanations for its decisions, the courts should give the ultimate judgments by elected officials a very high degree of deference. As this Court observed when faced with a similar line-drawing problem, "[a]lthough one might quibble about whether 15 feet is too great or too small a distance [from the entrance to an abortion clinic] if the goal is to ensure access, we defer to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear." *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 381 (1997). Moreover, given all the

incentives that sitting legislators have to assure that contribution limits do not impede their own fundraising efforts, coupled with their ability to raise money because of their current positions of power, the likelihood that a law will be enacted that will hamper their ability to run an effective campaign for re-election seems quite remote.

We recognize that this statute is challenged under the First Amendment, but the context is somewhat unusual because of the necessity for line-drawing of a kind not often permitted in First Amendment jurisprudence. Thus, at some point a contribution limit "could effectively become an impermissible burden" on First Amendment rights. *Burson v. Freeman*, 504 U.S. 191, 210 (1992). However, like the 100-foot boundary upheld in *Burson*, over a claim by the lower court that 25 feet was ample, it is not the role of a court to second-guess the legislature's carefully considered judgments about the appropriate contribution limitation for a particular election race. Finally, given the growing discontent with the political processes and with the flood of special interest money inundating elections today, the courts should be particularly respectful of efforts by the States and their citizens to clean their own houses.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed; and judgment entered for petitioners.

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April 9, 1999

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No. 98-963

IN THE SUPREME COURT OF THE UNITED STATES CLERK

October Term, 1998

**JEREMIAH W. (JAY) NIXON,
ATTORNEY GENERAL OF MISSOURI,**

Petitioner,

v.

SHRINK MISSOURI GOVERNMENT PAC, et al.,

Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**BRIEF OF *AMICI CURIAE* STATES OF OHIO,
ALASKA, ARIZONA, ARKANSAS, COLORADO,
CONNECTICUT, DELAWARE, FLORIDA, HAWAII,
IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE,
MARYLAND, MINNESOTA, MONTANA, NEW MEXICO,
NEW YORK, NORTH CAROLINA, OKLAHOMA, RHODE
ISLAND, TENNESSEE, UTAH, VERMONT,
WASHINGTON, THE COMMONWEALTHS OF
KENTUCKY AND MASSACHUSETTS AND THE
TERRITORY OF U.S. VIRGIN ISLANDS IN SUPPORT OF
PETITIONER**

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STATEMENT OF *AMICI* INTEREST

The State of Ohio and 29 other *amici* States and Territories join together in urging the Court to reverse the judgment below. At issue is their authority to limit—in light of local experience and consistent with the varying political realities each faces—the sometimes corrosive role that large-dollar campaign contributions can play in state and local elections. Since the Court issued its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding the constitutionality of limits on campaign contributions to candidates for *federal* offices), dozens of States have relied on that decision in crafting similar limits on contributions to candidates in state and local races.

Now the Eighth Circuit's decision striking Missouri's \$1,075 limit on individual contributions to statewide candidates has called into question similar laws in many other States. Some of the States joining this brief permit individuals to make larger campaign contributions than does Missouri, while others impose more stringent limits. Still others impose no limits at all. Yet each of the States shares an interest in preserving the flexibility that *Buckley* and the First Amendment rightly give them: the authority to decide whether unchecked campaign contributions pose a threat to the political process, and the ability to control that threat by limiting—in varying degrees—the amount of money that any one contributor may give to a candidate for public office.

The need for such limits is an inquiry the States should be left to assess for themselves in light of their particular concerns for, and experience with, the potentially corrupting influence of large campaign contributions. Some have seen no need to impose limits, while others have chosen to closely regulate the process. The important point is that *Buckley* expressly approved such limits, and the First Amendment does not prevent the States from enacting them. Because the

States have such a critical interest in retaining the freedom to regulate their own electoral systems as local conditions warrant, we submit this *amicus curiae* brief for the Court's consideration.

SUMMARY OF ARGUMENT

While the First Amendment to the U.S. Constitution protects the public's right to express opinions and to communicate ideas, that Amendment also allows government to regulate election campaigns to ensure that the candidates chosen in those campaigns are not beholden while in office to their contributors. Throughout the nation's history, but particularly during the last thirty years, the States have enacted a wide variety of measures designed to keep their election campaigns—and more importantly, the daily workings of state and local government—free from corruption. Some States have limited campaign contributions or imposed reporting requirements on candidates. Others have experimented with restrictions on the political activities of government employees or have limited the number of terms in office that elected officials may serve. Still others have moved toward public financing of campaigns, much like the system used to fund presidential campaigns. With each of these changes, the States aim not just to improve the responsiveness and effectiveness of government, but to increase the public's confidence in their elected officials and their public institutions as well.

Reasonable persons can disagree about the wisdom of these measures, and surely few would claim that contribution limits or any other single reform effort has proven to be the perfect answer to either the problem of political corruption or the decline in public confidence in our elected officials. Yet

the constitutionality of these measures should not be in doubt, unless (in the rare circumstance) they have the effect of preventing candidates from engaging in vigorously competitive campaigns. Campaign finance reforms enacted by the States are the product of the public's outrage at a government that appears to be slipping further away from the people it serves. Courts should not look at these measures with excessive suspicion, for they vindicate the fundamental principles of representative democracy that the First Amendment—indeed the Constitution as a whole—is designed to advance. And indeed, from *Buckley* forward, the Court has repeatedly permitted the States and Congress to enforce reasonable restrictions on campaign contributions in order to prevent corruption and the appearance of corruption in our election campaigns. Contribution limits permit all citizens to have their say in how our democracy should function and who should lead it, while addressing the States' justified concern that contributors and candidates may potentially engage in financial dealings that tie the hands of the latter once they are in office.

Because contribution limits advance a long-recognized compelling government interest in controlling corruption, and because those limits can help to achieve an electoral system that fosters honest public debate without unduly restricting the freedoms of speech or association of candidates or contributors, courts ought to give deference to the legislature's conclusion that those limits are needed. Contribution limits apply in a viewpoint-neutral way to all candidates, both incumbent and challenger alike. Only where those limits prevent candidates from waging a vigorous campaign should the First Amendment be read to block their enforcement. Short of that showing by a candidate, the States should be free to determine for themselves the most

appropriate dollar-amount limit for their particular statewide and local races (assuming, again, that they have determined that there is a need for some limit within their particular jurisdiction). And in the end, the States should be permitted to experiment with reforms like contribution limits that promote rather than frustrate the unfettered public debate and responsive honest government that the public rightly demands.

ARGUMENT

I. The States Have Enacted Scores Of Campaign Contribution Limits Since *Buckley* Was Decided, With Each Selecting The Level Of Regulation It Feels Will Best Promote The Integrity Of Its Own Electoral Processes.

The variety of campaign finance reforms enacted by the States is remarkable. To confirm this truth, one need only examine a Federal Election Commission publication entitled *Campaign Finance Law 98* by Edward D. Feigenbaum and James A. Palmer (lodged with the Clerk of this Court simultaneously with the filing of this brief). Even in the area of campaign contributions alone, notable variations exist, each reflecting the particular concerns of the several States. Some States, like Alaska and Maryland, impose a blanket dollar-amount restriction on individual contributions to candidates, regardless of the office involved. Arizona, Missouri and others impose varying limits for contributions to statewide candidates on the one hand, and to all remaining down-ticket candidates on the other. Some States, like Connecticut and Minnesota, impose different contribution limits for various statewide offices, as well as other limits for lower-ticket races.

The timing and the method of payment are also subject to regulation in some States. In California and Delaware, limits on contributions are tied to the election cycle (encompassing the total time between elections for the same office), while in other States, like Minnesota and New York, the limits are tied to the calendar year. Some States, like Florida and Massachusetts, have seen fit to limit the amount of money that children may contribute to political candidates; or, as in Louisiana, have restricted contributions from government employees to candidates; or, like Oklahoma and Pennsylvania, now bar anonymous campaign contributions. (This Court's decision in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), does not disturb *Buckley*'s holdings regarding the permissibility of disclosure requirements for campaign contributions.)

And all of the limits just described apply only to contributions from individuals to candidates. There are in some States restrictions as well on other entities that may give or not give contributions, and in varying amounts (such as corporations, unions, PACs or national political parties) and restrictions on those to whom contributions may be given (such as political parties or PACs). And some States restrict the transaction associated with the contribution—through limits on cash contributions or receipt requirements—and still others regulate those government employees who may solicit political contributions (or who may be targeted for such solicitation efforts themselves).

In short, the variety of campaign finance reforms in the States—even in the narrow niche of campaign contribution regulations, quite apart from regulations of expenditures, public financing, reporting requirements and

other regulatory devices—is stunning. The States, following *Buckley*, have created an incredible diversity of laws designed to address the unique concerns each faces in battling corruption and the appearance of corruption, and contribution limits have become an important tool in that battle.

Several States of course have chosen to leave campaign contributions virtually unregulated, while others have not. And just as the States do not agree on what works and what does not in their efforts to address the danger of corruption associated with influence-peddling between large-dollar campaign contributors and candidates for public office, so the scholarly literature in the field provides no easy answers on the best choices either. See, e.g., David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994) (proposing new way to think about the issue of corruption); C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Harv. Civ. Rts.-Civ. Lib. L. Rev. 1 (1998) (proposing new way to think about the institutional structure of election campaigns); Frederick G. Slabeck, *The Constitution and Campaign Finance Reform: An Anthology* (1998) (useful collection of excerpts from oft-cited articles).

“In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.” *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). We cannot hope to resolve in this brief all differences between the experts or the various States on the wisdom of contribution limits, and surely courts are ill-equipped to make those policy judgments as well, even were that their role.

Rather, we write in this case, first, to show the very real consequences of judicial action in this area of the law, for when a court strikes a campaign finance law in one State, it calls into question a whole host of related legal cousins elsewhere. And we write as well to urge the Court to let the States experiment in this area, not because the reforms are bearing fruit in some States—though many believe that is true—but because those States that impose contribution limits do so in the justifiable belief that these limits are necessary to ferret out the potentially corrupting role of big dollars in political campaigns. The Constitution does not frown on the States’ objective here. Rather it embraces it, for the integrity of our democratic institutions suffers not just when traditional public debate on issues is squelched by the government, but also when quid pro quo deals are made between a big contributor and the public official, or when the need to raise campaign funds undermines the formulation of public policy.

The Constitution does not place the rights of those who would donate large amounts above the public’s right to maintain a democratic system free from a pay-to-play approach to governing, and the First Amendment does not require the States to stand idly by while the temptation for corruption and the even more dangerous public cynicism it breeds run rampant in the name of free speech. Whatever their differences on the wisdom of contribution limits, the States all agree that the First Amendment should protect, not limit, the very experimentation now evident in their efforts to stamp out those twin evils.

II. A Contribution Limit Is Constitutional Unless It Prevents Vigorously Contested Elections.

A. The Constitutional Analysis Of Contribution Limits Articulated In *Buckley* Remains Sound Today.

1. A fair reading of *Buckley* is that it holds contribution limits to be constitutional unless, in the context of particular elections, they prevent candidates from waging vigorously contested campaigns. This reading of *Buckley* is derived from putting together two points that the Court's opinion explicitly makes. First, the Court says: "Congress was surely entitled to conclude that . . . contribution ceilings were a necessary legislative [measure] to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." 424 U.S. at 28. (The Court reiterates this first point later in its opinion when it states: "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large money contributions be eliminated." *Id.* at 30.) Second, in rejecting the claim that Congress was required to justify the particular limit of \$1,000, in comparison to some higher amount, the Court responds that "Congress' failure to engage in such fine tuning does not invalidate the legislation," and then quotes approvingly the Court of Appeals' assertion that "if it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000." *Id.*

Together, these two points add up to the proposition that Congress, or a state legislature, is constitutionally entitled to adopt any particular level of contribution limit (unless, as

we will discuss subsequently, it can be shown that the limit prevents candidates from waging vigorously contested campaigns). The latter point is that the legislature can choose whatever level of limit it thinks best as long as it justifiably believes some limit is necessary. The former point is that this legislative belief is generally justified because the absence of any limit at all might well result in an appearance of corruption (as well as inevitably increasing the risk of actual corruption). Thus, as a general rule, a legislature has the constitutional authority to choose whatever particular level of contribution limit it finds most reasonable because a legislature is entitled to believe that some limit is necessary to avoid at least the appearance of corruption.

The only qualification to this general rule is that the constitutionality of a contribution limit is unsustainable if the limit prevents candidates from engaging in vigorously contested campaigns. For this reason, the Court obviously finds it "significant[]" that the record in *Buckley* shows that the contribution limits there "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues." *Id.* at 28-29. And this qualification is what the Court has in mind when it says that the specific level of a contribution limit—that is, \$1,000 instead of \$2,000—becomes constitutionally "significant only when ["such distinctions in degree"] amount to differences in kind." *Id.* at 30. In other words, the legislative choice of \$1,000 rather than \$2,000 becomes a "difference in kind" and thus unconstitutional if (but only if) the choice of the lower level has the consequence of stifling a robust electoral debate. In sum, the proposition of law to extract from *Buckley* holds that contribution limits are constitutionally valid (as measures to avoid at least the appearance of corruption) unless, in a particular case, they

happen to have the pernicious effect of preventing a vigorously contested campaign.

2. In this case, the Court should reaffirm this proposition of law, not solely on the grounds of stare decisis, but also because the proposition remains as sound now as at the time of *Buckley*. Twenty-three years have not changed the fact that, without any contribution limit at all, there may well exist an appearance of corruption (as well as a heightened risk of actual corruption). Nor has the passage of time altered the truth that it is impossible for a legislature to determine the precise dollar amount of the largest political contribution that poses no realistic risk to the integrity of the electoral process. Consequently, once it is established that *some* level of contribution limit would be constitutionally permissible for every election, the decision of exactly what level of limit to adopt remains a matter best left to legislative discretion, without judicial interference, unless it can be shown that the legislative choice will prevent a vigorously contested election.

Moreover, *Buckley's* general presumption that a contribution limit is constitutional rests upon a weighing of competing constitutional values that remains just as valid today as then. Avoiding both actual corruption and the appearance of corruption preserves "the integrity of our system of representative democracy," (*Buckley*, 414 U.S. at 26-27), and few governmental interests can be of greater importance than maintaining an electoral system that is—and is seen by citizens to be—free from the taint of influence-buying. Conversely, as the *Buckley* Court recognized, a contribution limit "entails only a marginal restriction on the contributor's ability to engage in free communication." *Id.* at 20. Instead, a contribution limit threatens free expression, if

at all, only when it causes an inability of candidates to engage in a vigorously contested electoral race. Thus, balancing the need to avoid both real and perceived corruption against the presumptively minimal intrusion on First Amendment values yields the conclusion that contribution limits are presumptively constitutional (unless and until they are shown to have the anti-democratic effect of preventing a robust debate among candidates).

There should be no doubt about the correctness of this constitutional calculus. The balance of competing constitutional considerations weighs heavily in favor of a general presumption that contribution limits are constitutionally valid. But in the event that the Court might find it useful, we offer a brief review of exactly why the interests in avoiding corruption and its appearance are so strong and why the threat of a contribution limit to First Amendment liberties is so (presumptively) slight.

B. The First Amendment Permits The States To Safeguard The Integrity Of The Electoral Process.

1. The corruption that concerned *Buckley*, and which will always remain a pressing concern in a representative democracy, is the possibility that candidates, once elected, will favor the interests of large-money contributors over the interests of others. This favoritism need not take the form of a fully-acknowledged "quid pro quo" between candidate and contributor. The favoritism can be as corrupting to representative democracy if the elected official feels obligated to give the interests of a big donor the benefit of the doubt in a close case.

The reason why this kind of favoritism is fundamentally antithetical to the integrity of representative democracy is that democracy is premised on the idea that the interests of all citizens count equally for purposes of determining public policies. See Robert Dahl, *Democracy and Its Critics* 85 (1989). As Jeremy Bentham put this basic point, "everyone [is] to count for one and no one for more than one." *Id.* at 86. This idea, of course, does not mean that everyone is entitled to prevail in having public policies coincide with their best interests. The operation of legislative decisionmaking in a representative democracy necessarily has its winners and losers. But the idea does mean that no one's special interests are entitled to extra weight or consideration in the determination of public policy just because of who they are or how much financial control they can exercise over a candidate's campaign.

To be sure, this point about the equal consideration of all citizens' interests in a democracy is different from the argument for an equalization of voices that is often made to defend expenditure limits, which are not involved in this case. The former point concerns solely the status of citizens and their competing interests in the decision-making of an elected official who is considering the pros and cons of adopting a particular public policy. The latter involves the very different issue of how much expression individual citizens may engage in to publicize their interests—an issue that obviously raises distinct First Amendment concerns, as *Buckley* recognized.

Moreover, the public perception that large-money contributions generate this kind of favoritism, or special consideration, by subsequently-elected officials is, as *Buckley* also recognized, almost as problematic as any actual favoritism that might occur. The reason that public

perception is so important is that the legitimacy of a system of government depends on the public's willingness to accept the system as fundamentally fair. And if the public has reason to believe that candidates owe their loyalty to a few well-heeled contributors, faith in our representatives and in the integrity of the political process suffers. This loss of faith leads to disinterest and detachment—the great foes of deliberative government. What the Court said decades ago about one of the first congressional attempts to regulate campaign contributions still applies to the States' efforts to regulate those contributions today:

[I]ts aim was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.

United States v. International Union Automobile, Aircraft and Agricultural Implement Workers of Amer., 352 U.S. 567, 575 (1957) (discussing Tillman Act of 1907 that prohibited political contributions by corporations and banks).

In any event, there can be no denying that avoiding corruption and the appearance of corruption are among the most paramount of values that the law, or a piece of legislation, can endeavor to achieve. And as Chief Judge Wilkinson wrote just this year on behalf of the Fourth Circuit in a decision upholding contribution limits in North Carolina, the "effort on the part of a state legislature to protect itself from the damaging effects of corruption should not lightly be thwarted by the courts. Here, the proper judicial posture

should be one of restraint.” *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 717-18 (4th Cir. 1999).

2. In contrast to the States’ efforts “to protect the free discussion of governmental affairs,” which is, as *Buckley* notes, “a major purpose of [the First] Amendment,” 424 U.S. at 14, the act of giving money to another person is quite far removed from the heart of free expression. This point is true even if both the donor and donee know that the money will be used to engage in core political speech, like campaign advocacy. While the candidate’s speech explaining his proposed agenda or policy priorities obviously lies right at the heart of the First Amendment, the contributor’s act of handing money to the candidate is not itself “speech,” unless one considers it an act of symbolic speech, tantamount to uttering the words, “I support this candidate.” Yet, as *Buckley* recognized, an upper limit on the dollar amount of a campaign contribution, unaccompanied by any limit on independent expenditures, still permits the contributor to utter those words of political support as much as he wishes (and to disseminate these words using as much money as he is willing and able to spend).

Furthermore, as *Buckley* also acknowledged, a contribution limit still enables the contributor to engage in the “symbolic speech” of letting the contribution convey the message of political support. After all, as long as the contribution limit is not zero, the contributor still is free to hand the candidate a check (and to do so in public) and to write the check up to the amount of the legal limit. It is true that the contributor is not free to write the check for \$1,000,000 when the limit is \$1,000, and it is also true that a \$1,000,000 check would convey symbolically some additional message about the intensity of the contributor’s support for

the candidate—tantamount to uttering the words, “I really, really support this candidate.” In any event, however, the deep-pocketed contributor is still at liberty to spend as much of his wealth as he wishes on independent messages to proclaim publicly how much he supports the candidate. Thus, a prohibition on *giving to a candidate* an amount of money *above a certain limit* is, as *Buckley* said, at most a “marginal” interference with the free expression of ideas. 424 U.S. at 20.

C. *Buckley* Strikes A Proper Balance Between The States’ Interest In Electoral Integrity And The Candidates’ Interest In Mounting Vigorous Campaigns.

The true threat to free speech that a contribution limit *conceivably* might make, as *Buckley* understood, is the possibility that candidates might be unable to raise enough money to wage vigorous campaigns. But this risk is remote, as *Buckley* also understood, as long as candidates are free to raise the same overall dollar amount from a larger number of donors, each contributing smaller sums. Although it is surely easier for a candidate to raise \$1,000,000 from a single donor, rather than from one thousand donors each contributing \$1,000, as long as the candidate is able to get to a comparable bottom line, either route gives him the same purchasing power for buying advertising time. There is no diminution of political speech as a result of the contribution limit.

Moreover, requiring a candidate to raise \$1,000,000 from one thousand donors, rather than one, demonstrates precisely how contribution limits serve the compelling goal of avoiding corruption or the appearance of corruption. Precisely because it is so much easier to raise a large sum of money from one benefactor, rather than many benefactors, it

is also easy to become beholden—or appear to become beholden—to giving special consideration to that one benefactor's interests. It is much harder to provide special treatment for a thousand different individuals, many of whom have conflicting interests. To be sure, requiring a candidate to spend the time necessary to raise \$1,000,000 from a thousand donors, rather than currying the favor of a single donor, may have costs, like making it more difficult for candidates, but especially incumbents, to perform their official duties or to educate themselves about details of important policy issues. Nonetheless, a legislature is entitled to make the discretionary judgment that, overall, the integrity of a well-functioning democracy is better served by requiring candidates to spend the time necessary to raise their campaign funds from a large base of donors.

Thus, *Buckley* struck the right balance of constitutional considerations in holding that contribution limits are presumptively valid—because presumably candidates still can raise enough money to wage vigorous campaigns by enlarging their pool of donors. But this presumption is rebuttable by showing that, in the context of a particular contribution limit and a particular election, candidates are unable in this way to raise the necessary funds to engage in vigorous campaign advocacy. If in a given case the presumption is rebutted by this kind of showing, then a court quite properly should invalidate the contribution limit as inconsistent with the freedom of expression necessary for democratic elections. But, absent this kind of showing, then, as *Buckley* held, courts should sustain contribution limits as constitutionally valid, since, by their very nature they require candidates to seek funds from a large number of donors, and thus serve the compelling goals of avoiding actual and perceived corruption.

III. Parties Challenging Contribution Limits Should Bear The Burden Of Showing That The Limits Prevent Candidates From Waging A Vigorous Campaign.

Given the proposition of law properly derived from *Buckley*—that contribution limits are constitutional unless they prevent vigorously contested campaigns—it follows that *Buckley* effectively established a rule for the burden of proof in a case challenging the constitutionality of a particular contribution limit. It is the burden of parties who challenge the contribution limit to show that the limit prevents candidates from waging vigorously contested campaigns. If these parties meet this burden, then they should prevail (with the court enjoining the application of the limit to the particular elected office at issue). But if they fail to meet this burden, then the government should prevail in its defense of the limit's constitutionality. And if those challenging the constitutionality of the contribution limit fail even to proffer evidence that would tend to show the inability of candidates to wage vigorous campaigns, then the government should be entitled to summary judgment on the ground that there is no genuine issue of material fact.

It is important to be clear about precisely what evidence these challenging parties would need to offer to defeat the government's motion for summary judgment. It would not be enough for a particular candidate to show that the contribution limit prevents *him* from raising an amount of money sufficient to wage a vigorous campaign. Nor would it suffice for this candidate to show also that *he* would have been able to raise the amount necessary for vigorous

campaign advocacy had identifiable donors been able to contribute sums above the legislative limit.

Instead, the proper focus of the factual inquiry is on the effect of the contribution limit *on the race for the particular elected office as a whole*. In other words, as long as there are plenty of other candidates who, despite the contribution limit, are able to raise enough money to wage vigorously competitive campaigns against each other, then the electoral process is well-functioning. In this situation, even with the contribution limit, there is still a robust debate among competing candidates, and the electorate is able to use that debate to make a choice about who should be selected to serve in office. Free political expression remains flourishing and hardly has been stifled by the contribution limit. The only consequence is that *a particular candidate* has been unable to raise the funds necessary *for him* to enter the fray on a competitive basis with the other candidates for the same office. But this consequence means only that this particular candidate lacks the breadth of popular support that the other candidates have (a fact that is surely relevant to a well-functioning electoral process's efforts to winnow the field to, eventually, a single winner). See *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

Moreover, any individual who would be willing to give this relatively unpopular candidate a large campaign contribution would still be free to spend that money independently in an effort to build greater support for that candidate. Thus, this supporter's freedom to express a public message of support for the candidate remains fully protected. It is true, of course, that the contribution limit prevents the particular candidate himself from having control of this money to publicize his own message. But, just as obviously, there is

no constitutional requirement that candidates be able to receive whatever funds anyone is willing to give them. There is no doubt about the constitutionality of limits, or even prohibitions, on campaign contributions by foreign governments or citizens, or corporations or labor unions. See *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982). This is true *even though, in the absence of those limits or prohibitions, the candidate would have received enough money to wage a vigorous campaign against other competitive candidates*. In other words, the legislature is entitled to keep these potentially corrupting sources of funds from entering a candidate's campaign coffers, in part to permit the electoral process to determine which candidates become competitive without receiving those potentially corrupting funds. Likewise, the legislature is entitled to make the judgment that, as long as there are enough competitive candidates, the electoral process is better served when those who can wage vigorous campaigns do so without receiving large amounts of money from a small number of donors.

Thus, when the issue is viewed, as it should be, from the perspective of the electoral race as a whole, there is no First Amendment violation just because a particular candidate is unable to raise the money that *that* candidate needs for a competitive campaign. On the contrary, the interests of the First Amendment are fully served by the existence of an ample number of other candidates who are able to raise sufficient funds for competitive campaigns, as well as the unfettered freedom of everyone to express independently whatever political messages they wish. Likewise, the compelling interest of protecting the integrity of the electoral process justifies a contribution limit that requires candidates raising funds from outside sources to do so from a large number of

donors, even if the consequence is that a particular candidate is unable to secure a broad base of donors. On balance, the competing constitutional considerations require a candidate challenging a contribution limit to prove more than just the fact that *his own candidacy* was rendered uncompetitive by the contribution limit. Instead, he must prove that the contribution limits led to an insufficient number of competitive candidacies, so that the result was that the electorate was denied a meaningful choice in the process.

A candidate might meet this burden in either of two ways. One would be to show that contribution limits caused one candidate (perhaps, at times, the incumbent) to have so much of an advantage that all others, as a group, were unable to wage a vigorous race. The other would be to show that although all candidates were able to raise roughly the same amount of money, that amount was not enough, in the given media market, for any of the candidates to engage in a robust public debate of the issues, thereby depriving the electorate of any meaningful choice on election day. (This problem could arise in open-seat contests as well as those involving challenges against incumbents.) But unless there is a showing that, in some way, the contribution limit causes a systemic frustration of a competitive election process, the burden of proof on the relevant factual issue has not been met, and the contribution limit should be sustained as constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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CLERK

No. 98-963

In The
Supreme Court of the United States

October Term, 1998

JEREMIAH W. NIXON, *et al.*,

Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC and
ZEV DAVID FREDMAN,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE SECRETARIES OF
STATE OF ARKANSAS, CONNECTICUT, IOWA,
MASSACHUSETTS, MISSISSIPPI, MISSOURI,
MONTANA, NEW HAMPSHIRE, NEW MEXICO,
RHODE ISLAND, TENNESSEE, WEST VIRGINIA
AND WISCONSIN; THE EXECUTIVE DIRECTOR OF
THE HAWAII CAMPAIGN FINANCE SPENDING
COMMISSION; AND THE DIRECTOR OF THE
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IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici include the following Secretaries of State: Sharon Priest of Arkansas; Susan Bysiewicz of Connecticut; Chet Culver of Iowa; William Galvin of Massachusetts; Eric Clark of Mississippi; Bekki Cook of Missouri; Mike Cooney of Montana; Bill Gardner of New Hampshire; Rebecca Vigil-Giron of New Mexico; James Langevin of Rhode Island; Riley Darnell of Tennessee; Ken Hechler of West Virginia; and Doug LaFollette of Wisconsin.¹ *Amici* also include Robert Watada, Executive Director of the Hawaii Campaign Finance Spending Commission and William Maxwell Bushart, Acting Director of the Registry of Election Finance of Kentucky. In these positions, *amici* serve as chief election officers or supervisors of campaign finance in their States. They thus have considerable experience with the issues raised in this case and, in particular, have witnessed the serious threats that unlimited campaign contributions pose to the integrity of the electoral process.

Amici seek reversal of the Eighth Circuit's decision in this case because that court's interpretation of *Buckley v. Valeo*, 424 U.S. 1 (1976), threatens to undermine reasonable campaign contribution limits at the state, local and federal level that are necessary to preserve the health of our democracy. Relying on this Court's conclusion that

¹ The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

legislatures may eliminate "the opportunity for abuse inherent in the process of raising large monetary contributions" (*Buckley*, 424 U.S. at 30), thirty-five states and a large number of localities have enacted campaign contribution limits similar to those at issue here, based on their studied belief that such regulations are necessary to prevent actual and apparent corruption in state and local government. These reasonable contribution limits help stem widespread public cynicism about elected officials' ability to govern in the public interest and check the capacity of wealthy interests to exert improper influence over legislative and executive policies. Left undisturbed, the Eighth Circuit's decision will erect a new, insuperable barrier for states to justify the adoption of such limits, undermining existing laws throughout the country and chilling the future efforts of other jurisdictions to enact similar, necessary regulations.

SUMMARY

Having examined "a broad spectrum of opinions" regarding the proper balance between the need for funds adequate to run viable campaigns and the potential for buying influence, the Missouri General Assembly adopted a schedule of carefully graduated contribution limits that would be adjusted over time according to inflation. Appendix ("App.") 14a-15a.² Notably, the

² In this brief, citations to "App." refer to the Appendix attached to the Petition for Writ of Certiorari filed by petitioners Jeremiah W. (Jay) Nixon, Richard Adams, Patricia Flood, Robert Gardner, Donald Gann, Michael Greenwell, Elaine Spielbusch,

highest of these contribution limits, which applied to statewide offices and to local offices where the population exceeds 250,000, matched the limit applicable to candidates for federal office upheld in *Buckley* which is still in force today. The District Court, noting that "[t]here is more than ample reason to defer to the considered judgment of the Missouri legislature", found the limits entirely consistent with this Court's decision in *Buckley*. App. 41a. A divided panel of the Eighth Circuit reversed, announcing three distinct interpretations of what a state must demonstrate to justify the imposition of contribution limits and casting a pall of doubt over the future viability of such limits throughout the country.

By rejecting the Missouri legislature's informed judgment regarding the actual conditions of Missouri politics, the panel majority ignored a central tenet of this Court's decision in *Buckley*. While the *Buckley* Court recognized that the contribution limits are necessary to serve the government's compelling interest in "deal[ing] with the reality or appearance of corruption *inherent* in a system" of large contributions (424 U.S. at 28) (emphasis added), the Court of Appeals insisted that the government does not have such a compelling interest absent proof of "real corruption" or the perception of corruption which is demonstrably "public", "objectively 'reasonable' " and " 'derived from the magnitude of . . . contributions' " that historically have been made to candidates running for

and Robert McCulloch. See *Nixon v. Shrink Missouri Government PAC*, Petition for Writ of Certiorari (filed December 14, 1998). Citations to "Jnt. App." refer to the Joint Appendix filed by the parties along with their merits briefs on April 12, 1999.

public office in Missouri". App. 6a-7a.³ The panel majority effectively nullified an integral premise of this Court's campaign finance decisions by imposing a new and impossible burden of proof for states to carry in order to justify contribution limits. See App. 18a (Gibson, J., dissenting).

The Eighth Circuit's decision flies in the face of this Court's common sense recognition that "the scope of [actual corruption] can never be reliably ascertained". *Buckley*, 424 U.S. at 27. By requiring "demonstrable evidence" of "genuine problems" (App. 5a), the panel majority destroyed a major pillar of this Court's analysis of campaign finance, under which "marginal restrictions upon the contributor's ability to engage in free communication" have been approved in light of the grave, self-evident threat to our electoral systems' legitimacy posed by unlimited campaign contributions. See *Buckley*, 424 U.S. at 20-21.⁴ Nothing in the record below justifies the

³ Compare *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) (plurality opinion) (contribution limits serve the government's compelling interest in "assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption"); *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973) (avoiding appearance of improper influence is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent").

⁴ See also *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 500 (1985) (approving "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"); *FEC v. National Right to Work Committee*, 459 U.S. 197, 210 (1982) ("Nor will [the courts] second-guess a

Eighth Circuit's departure from the established doctrine that contribution limits are constitutionally justified and practically necessary as a prophylactic shield against the corruption of our electoral process.

The pervasive appearance of corruption in electoral politics arises not only from the legion historical examples of influence peddling⁵ but also from the simple fact that the vast majority of Americans cannot afford to contribute substantial money to campaigns as their

legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) ("no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth is great, and the legislative purpose prophylactic").

⁵ See generally, CHARLES LEWIS AND THE CENTER FOR PUBLIC INTEGRITY, *THE BUYING OF CONGRESS: HOW SPECIAL INTERESTS HAVE STOLEN YOUR RIGHT TO LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS* (1998). Analyses of corrupt political practices dominate public discourse throughout the country. See, e.g., E.J. Dionne, *Democracy or Plutocracy?*, WASHINGTON POST, op-ed, February 15, 1994, p.A17; Tom Fiedler, *Big Interests Spending Equally Big Bucks: Millions of Dollars Given to Campaigns of Influential Policy Makers*, THE MIAMI HERALD, May 21, 1995, p.14A; Philip B. Heyman & Donald J. Simon, *Parties to Corruption*, THE WASHINGTON POST, op-ed, June 25, 1998, p.A23; Albert R. Hunt, *The Best Congress Money Can Buy*, THE WALL STREET JOURNAL, September 7, 1995, p.A15; Celinda Lake & Steve Cobble, *Voters Say Take 'Big Money' Out of Campaigns*, MILWAUKEE JOURNAL SENTINEL, op-ed, April 16, 1995, p.4A; Rodney A. Smith, *White House Auction*, THE WASHINGTON POST, op-ed, April 14, 1995, p.A19; Howard Wilkinson, *No Campaign Money? Keep Your Mouth Shut About It*, THE CINCINNATI ENQUIRER, editorial, November 22, 1998, p.C1; *Political Scandal*, BOSTON GLOBE, editorial, October 31, 1996, p.A26; *Unlimited Cash, Undue Influence*, ST. LOUIS POST-DISPATCH, editorial, July 27, 1998, p.B6.

wealthy counterparts do. Any constitutional analysis of corruption and the appearance of corruption must be informed by this reality. Contribution patterns in Missouri and in states with similar limits show that the overwhelming majority of voters do not – and, realistically, cannot – contribute to political campaigns at anywhere near the limits set by Missouri. Median household income statistics confirm that the \$2,150 per election cycle limit in Missouri represents a substantial percentage of most citizens' earnings.

To determine the appropriate level of constitutional protection due to large contributions, one must also assay the systemic injuries they occasion. In this regard, it is critical to understand the actual operation of money in state politics. Respondents' own testimony below illustrates the instrumental use of campaign funds to discourage electoral competition. Campaign war chests impose a substantial *in terrorem* disincentive on citizens who would challenge well-funded candidates and on supporters who would contribute money to such challengers.

Moreover, allowing those with easy access to wealth to accumulate such war chests from a small number of prodigious contributors would violate the premise that candidates in democratic elections should enjoy a significant modicum of popular support. Attention to the actual uses of campaign war chests informs a detailed understanding of the corrosive role of money in elections and affords further evidence that the *Buckley* Court's approval of prophylactic contribution limits remains correct and wise.

Without guidance from this Court resolutely reaffirming the constitutionality of contribution limits, a

wave of strategic litigation challenging such limits throughout the country will effectively destroy the modest, yet critical, prophylactic role they play in our electoral process. This Court has specifically disavowed any evidentiary burden that effectively requires a state's political system to "sustain some level of damage before the legislature can take corrective action". See *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).⁶ Amici respectfully urge the Court to repel respondents' onslaught on the modest role that contribution limits play in the preservation of the integrity of our electoral process. By assessing in a realistic light the exclusionary and distorting effects of large or unlimited campaign contributions, this Court should reaffirm the wisdom of its established understanding that "marginal restrictions on the contributor's ability to engage in free communication" are constitutionally sound and fundamentally necessary. *Buckley*, 424 U.S. at 20.

⁶ In *Munro*, this Court noted that

"[w]e have never required a State to make a particularized showing . . . prior to the imposition of reasonable restrictions on ballot access. To require States to prove [harm] as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless Court battles over the sufficiency of the 'evidence' . . ."

Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986). As set forth below in section II, contribution limits bear many functional similarities to ballot access requirements, because both oblige candidates to demonstrate a significant base of popular support.

ARGUMENT

I. BECAUSE EXISTING CONTRIBUTION LIMITS RADICALLY EXCEED SUMS THAT THE OVERWHELMING MAJORITY OF CITIZENS CAN CONTRIBUTE TO CAMPAIGNS, THE REMOVAL OR RAISING OF THOSE LIMITS CAN ONLY AUGMENT THE PERVASIVE AND CORROSIVE PERCEPTION OF CORRUPTION IN POLITICS.

Neither respondents nor the panel majority have articulated any convincing reason to depart from the principle articulated in *Buckley* that prophylactic contribution limits are justified by the government's compelling interest in stemming the corrosive effects of corruption and the appearance of corruption. The district court below recognized that "[d]espite Missouri's contribution limits, candidates for political office in the state are still able to amass impressive campaign war chests". App. 37a. The district court also noted that, since so few citizens contribute at or near Missouri's limits, "there is no reason to believe that Missouri's contribution limits have any 'dramatic adverse effect' on funding campaigns for state office". App. 39a (citing *Buckley*, 424 U.S. at 21). The panel majority did not dispute either of these findings.

While Missouri's limits have no demonstrable adverse effect on fundraising, they do provide a modest, but necessary, check on the ability of small numbers of wealthy contributors to corrupt officials or otherwise to improperly influence legislative and executive policies. Of equal importance is the role contribution limits play in alleviating the widespread perception of corruption in

politics. *Buckley*, 424 U.S. at 25-26; see also *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 658-659 (1990); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-501 (1985). However, the capacity of such limits to quell doubts about wealthy interests exerting improper influence is directly tied to the levels at which they are set. If, for instance, limits are gauged to allow the contribution of sums far beyond the means of an overwhelming majority of citizens, then the vast majority of citizens will naturally perceive that contributors who approach those limits exert a disproportionate influence over the officials they support. This common sense conclusion is borne out by experience. As one former United States Congressman put it,

"[p]eople who contribute get the ear of the [candidate] and the ear of the staff. They have access – and access is it. Access is power. Access is clout. That's how this thing works"⁷

The *Buckley* Court and the Missouri legislature recognized that the endemic problem of corruption was inherent in any system that allows large financial contributions. 424 U.S. at 30; App. 14a-15a.

In *Buckley*, the Court found it significant that only 5.1% of the money raised by federal candidates came in amounts greater than \$1,000. 424 U.S. at 26 n. 27. By

⁷ MARTIN SCHRAM, CENTER FOR RESPONSIVE POLITICS, SPEAKING FREELY: FORMER MEMBERS OF CONGRESS TALK ABOUT MONEY IN POLITICS, 63 (1995) (quoting Rep. Romano Mazzoli of Kentucky). Representative Mazzoli's comments about the correlation between contributions and influence are echoed throughout the book by members of both political parties.

contrast, in Missouri, less than 0.72% of the contributors to candidates for Secretary of State in 1992 made contributions of more than \$2,000.⁸ Less than 1.5% of the contributors to candidates for State Auditor in 1994 made aggregate contributions of more than \$2,000.⁹ These groups of large contributors represent only 0.0000026% and 0.000012%, respectively, of the voting age population in Missouri.¹⁰ For the typical family in Missouri, where the median household income is \$31,701,¹¹ one contribution to a statewide candidate at the per-cycle maximum of

⁸ These figures are derived from testimony presented by the Missouri Office of the Attorney General. See Jnt. App. 34-35. The figures compiled by the Attorney General's office, however, do not take into account the non-itemized contributions below \$100 when calculating the percent of total contributions that exceeded \$2,000. By dividing the total non-itemized contributions by the highest possible non-itemized contribution (\$99), *Amici* have derived the most conservative estimate of the number of non-itemized contributions. Adding this figure to the number of named contributors produces a more accurate, yet still conservative, estimate of the total number of contributions made to each office. *Amici* then calculated the percentage of contributions at or above \$2,000 using these totals.

⁹ "Presumably, some or all of the contributions in excess of \$1,000 could have been replaced through efforts to raise additional contributions from persons giving less than \$1,000." *Buckley v. Valeo*, 424 U.S. 1, 26 n. 27 (1974).

¹⁰ See U.S. Census Bureau, *Estimates of the Population of the U.S. and States by Single Year: July 1, 1992* (visited April 9, 1999) <<http://www.census.gov/population/estimates/state/stats/ag9297.txt>>.

¹¹ See U.S. Census Bureau, *County Estimates for Median Household Income for Missouri: 1995, Table C95-29* (visited Feb. 24, 1999) <<http://www.census.gov/cgi-bin/hhes/saipe93/gettable.pl>>.

\$2,150 represents almost one month's pre-tax salary. Clearly, large campaign contributions remain the exclusive prerogative of the wealthy.¹²

Fundraising data amassed by states with contribution limits similar to those in Missouri support the conclusion that the vast majority of the population cannot make contributions at or near the challenged ceilings. This data confirms the conclusions drawn by the district court regarding contributions in Missouri, in both statewide and legislative elections. In states with similar limits for statewide office, the vast majority of contributors contribute less than \$100 per election cycle. Only a tiny percentage contribute even half of the allowed per cycle maximum.

¹² In this vein, it is also critical to consider the relative differences in disposable income between wealthy and nonwealthy citizens. *Buckley*, 424 U.S. at 21 n. 22 ("Other factors relevant to an assessment of the 'intensity' of support indicated by a contribution include the contributor's financial ability").

**Contribution Patterns In States With Comparable Limits
For Statewide Elections¹³**

STATE & Cont. Limit	Perc. (%) <\$100	Cumulative Perc. (%) <\$250	Cumulative Perc. (%) <\$500	Cumulative Perc. (%) <\$750	Cumulative Perc. (%) <\$1,000	Cumulative Perc. (%) >\$1,000
Wash. (\$2,300 per cycle)	89.2%	94.9%	97.7%	98.2%	98.3%	1.7%
Wyoming (\$2,000 per cycle)	79.9%	89.3%	95.4%	95.8%	96.1%	3.9%

¹³ See Samantha Sanchez, National Institute on Money in State Politics, *Comparison of Contribution Sizes in Statewide and State Legislative Campaigns* (visited April 9, 1999) <<http://www.followthemoney.org>>.

In state legislative races operated by states with contribution limits similar to Missouri's, the official records of campaign contributions reflect the same pattern. Again, only a small fraction of contributors give even half of the allowed per cycle maximum.

**Contribution Patterns In States with Comparable
Limits for State Legislative Elections¹⁴**

STATE	Perc. (%) <\$100	Cumula- tive Perc. (%) <\$250	Cumula- tive Perc. (%) <\$500	Perc. (%) >\$500
Alaska	62.2	84.1	98.1	1.9
Florida	48.4	66.6	99.9	0.1
Kansas	67.7	88.6	98.3	1.7
Michigan	77.9	91.3	99.2	0.8
Wash.	84.0	93.0	97.4	2.6

The significance of these statistics becomes apparent when one takes account of citizens' average income, poverty rates, and the percentage of the total voting age population that makes any form of political contribution.

¹⁴ *Id.* Alaska and Florida limit contributions to legislative candidates to \$1,000 per cycle. In Kansas, the limits are \$2,000 per cycle for state senators and \$1,000 per cycle for representatives. In Michigan, the limits are \$1,000 per cycle for senators and \$500 for representatives. In Washington, all legislative candidate contributions are limited to \$1,150 per cycle. Federal Election Commission, *Campaign Finance Law 98: Chart 2-A Contribution and Solicitation Limitations* (visited April 9, 1999) <<http://www.fec.gov/pages/chart2a.htm>>.

Income, Poverty, and Voter Contribution Rates¹⁵

STATE	Median House- hold Income	Pov- erty Rate	Total Voting Age Pop.	Percent of VAP Making Cont.
Alaska	46,628	8.8	425,000	4.5%
Florida	29,993	16.3	11,043,000	0.8%
Kansas	30,288	12.9	1,897,000	1.9%
Michigan	35,719	13.9	7,072,000	1.0%
Wash.	35,885	12.1	4,115,000	3.7%
Wyoming	32,220	11.6	356,000	1.9%
Missouri	32,040	13.7	3,995,000	1.1%

Clearly, contribution limits in these states are not relevant to the vast majority of citizens except insofar as they prevent the miniscule portion of the electorate who have substantial wealth from usurping total control over the financing of campaigns. The majority of the American public perceives the potential and actual corruption

¹⁵ See U.S. Census Bureau, *Income 1995: Table C Median Income of Households by State: 1993, 1994, and 1995* (visited April 9, 1999) (data is average of years 1993-1995) <<http://www.census.gov/hhes/income/income95/in95med1.html>>; U.S. Census Bureau, *Poverty 1995: Table B Percent of Persons in Poverty by State: 1993, 1994, and 1995* (visited April 9, 1999) (data is average of years 1993-1995) <<http://www.census.gov/hhes/poverty/pov95/statepov.html>>; see also voting age population and contribution data from Sanchez, *supra* n. 13.

caused by large campaign contributions.¹⁶ Without robust contribution limits, this corrosive problem can only worsen.¹⁷ In this regard, it is important to keep in mind

¹⁶ In a 1996 poll taken directly after the November elections, Americans ranked the "power of special interest groups in politics" second only to "international terrorists" when asked to identify "major threats" to the future of the country. Princeton Survey Research Associates/Pew Research Center, *Public Opinion Survey* (November 1996) (visited March 18, 1999) <<http://www.people-press.org/unionrpt.htm>>. In this same survey, forty-nine percent of those polled believed the country was "losing ground" in its efforts to fight political corruption. A 1997 poll determined that three-quarters of Americans believe that "public officials make or change policy decisions as a result of money they receive from major contributors." See Francis X. Clines, *Most Doubt a Resolve to Change Campaign Finance Reform, Poll Finds*, N.Y. TIMES, Apr. 9, 1997, at A1. Although polls formerly showed that voters trusted their own congressional representatives while decrying corruption in general, even that has changed. An August 1998 poll of voters in eight states showed that between 65% and 75% of voters now believe that campaign contributions affect the votes of *their own* senators on issues of concern to special interests. The Mellman Group, Inc./Public Campaign, *Public Opinion Poll* (August 1998) (visited March 18, 1999) <http://www.publiccampaign.org/poll9__3__98.html>.

¹⁷ Even under the existing regimes of contribution limits, monied interests can still exert overwhelming influence over the electoral process through practices such as bundling – the coordinated donation of campaign contributions from individuals representing the same corporation, industry, or special interest – and other stratagems. See, e.g., Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1140-1142 (1994); Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 Yale L. & Pol'y Rev. 273, 326-327 (1993) (citing LARRY MAKINSON, CENTER FOR RESPONSIVE POLITICS, OPEN SECRETS: THE ENCYCLOPEDIA OF CONGRESSIONAL

that over ten percent of Missourians live at or below the poverty level.¹⁸ The national poverty rate from 1995 through 1997 averaged 13.6%.¹⁹ For these citizens, campaign contributions, and thus access to meaningful representation, are all but impossible.

On a related vein, the income disparities between counties in Missouri present another functional justification for contribution limits. The residents of Wayne County, whose median household income in 1995 was \$18,180, suffer a profound disadvantage in supporting their preferred candidates for statewide election compared to their fellow Missourians who live in St. Charles County, where the median household income is \$50,932.²⁰ A legislature could legitimately discern an injury of constitutional proportions in the fact that nearly three-to-one gross income disparities could, under a regime without contribution limits, undermine the fairness of statewide elections. If, as respondents claim, *see infra* Section II, a candidate's fundraising determines his or her success in

MONEY & POLITICS (2d ed. 1992)). While contribution limits alone may not be sufficient to assure the integrity of our political processes, they nonetheless remain a necessary element of any regulatory scheme. *Buckley*, 424 U.S. at 28; *Colorado Republican*, 518 U.S. at 609.

¹⁸ See U.S. Census Bureau, *Poverty 1997* (visited Feb. 24, 1999) <<http://www.census.gov/hhes/poverty/poverty97/pv97state.html>>.

¹⁹ *Id.*

²⁰ See U.S. Census Bureau, *County Estimates for Median Household Income for Missouri: 1995, Table C95-29* (visited Feb. 24, 1999) <<http://www.census.gov/cgi-bin/hhes/saie93/gettable.pl>>.

electoral competition, then clearly the residents of St. Charles County have a disproportionate opportunity to select and support candidates for statewide office.

Even if the *actual* integrity of elections were somehow not undermined by the dominant influence of large contributions, the *apparent* integrity of elections unavoidably is. When only a select few citizens are able to contribute vast sums of money, the remaining majority will quite rationally and justifiably assume that large contributors purchase access to public office, if not the office itself.²¹ The widespread perception of corruption in politics is no accident. Rather, it is the natural and rational conclusion drawn by citizens who cannot financially support electoral candidates at anywhere near the level of their wealthy counterparts. As the *Buckley* Court recognized, the government has a compelling interest in undertaking measures to check the pervasive perception of corruption and the deleterious long-term consequences it comports for our democracy.

²¹ A 1998 study of individuals who contributed over \$200 to federal candidates revealed that the overwhelming majority of large contributors report personal communication with officeholders they support, often regarding matters relating to their job or business. Notably, 95% of those who make large contributions are white and 81% are male. Further, 81% report incomes over \$100,000. JOHN GREEN, PAUL HERRNSON, LYNDIA POWELL, & CLYDE WILCOX, JOYCE FOUNDATION OF CHICAGO, *INDIVIDUAL CONGRESSIONAL CAMPAIGN CONTRIBUTORS: WEALTHY, CONSERVATIVE - AND REFORM-MINDED* (1998).

II. BY STEMMING THE EXCLUSIONARY AND DISTORTING EFFECTS OF CAMPAIGN WARCHESTS BUILT FROM SCANT POPULAR SUPPORT, CONTRIBUTION LIMITS HELP PRESERVE THE "UNFETTERED INTERCHANGE OF IDEAS" NECESSARY TO ELECTORAL POLITICS.

Respondents' own testimony only underscores the necessity of contribution limits. See Affidavit of Zev David Fredman in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, Jnt. App. at 10-11 (*hereinafter*, "Fredman TRO Aff."). In their various affidavits, Fredman and the Shrink Missouri Government PAC ("Shrink PAC") candidly admit that purely tactical concerns fuel their alleged need for large donations. See Jnt. App. at 10-11 (Fredman TRO Aff. ¶¶ 6-7), at 40 (Schock Aff. ¶ 24), and at 54-55 (Fredman Aff. ¶¶ 4, 11). Recognizing that money has become the essential weapon of campaign warfare, Fredman seeks larger contributions of money in order "to make it more difficult for other candidates to attract . . . voters" and "to discourage other potential candidates from entering the primary". Fredman TRO Aff. at ¶¶ 6-7.

While his candor may be admirable, Fredman's intentions are not. Respondents' stated objective of "discouraging other potential candidates" violates basic principles that the *Buckley* Court deemed essential to the proper function of our political system. The First Amendment was "designed to 'secure the widest possible dissemination of information from diverse and antagonistic sources', and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' ". *Buckley*, 424 U.S. at 49 (citations

omitted). Flatly contradicting the assumption that more campaign money leads to more campaign speech and a greater diversity of voices, respondents' testimony unmasks the instrumental and exclusionary role of fundraising in electoral competition.

Respondents' avowed intentions are no aberration; rather, they reflect the widespread use of fundraising as a tactical weapon in state electoral politics. See, e.g. Willaim Cassie & David Breaux, *Expenditures and Election Results*, in CAMPAIGN FINANCE IN STATE LEGISLATIVE ELECTIONS (Joel A. Thompson and Gary F. Moncrief, eds. 1998). As respondents suggest, viable electoral competition now revolves around the acquisition of money, instead of the potency of ideas. Those without fundraising prospects are driven from competition by the substantial, *in terrorem* specter of well-funded competitors. Accordingly, the unregulated race for money that respondents seek to reintroduce into Missouri politics is impermissibly exclusionary. If a small number of wealthy citizens can amass a campaign war chest to "discourage" competition from a candidate broadly supported by nonwealthy citizens, then the fundamental First Amendment interest in diverse information from the widest possible range of sources is defeated. The Court should gauge the constitutional protection due to large contributions in light of the exclusionary uses to which they are put.

By encouraging candidates to raise relatively smaller amounts from a larger group of contributors, contribution limits serve much the same electoral function as ballot access signature requirements. This Court has routinely approved reasonable limitations on access to the ballot in light of a state's "undoubted right to require candidates

to make a preliminary showing of substantial [popular] support in order to qualify for a place on the ballot". *Munro*, 479 U.S. at 194 (citing *Jenness v. Fortson*, 403 U.S. 431 (1971); *American Party of Texas v. White*, 415 U.S. 767 (1974); and *Anderson v. Celebrezze*, 460 U.S. 780, 788-789 n.9 (1983)). Since contribution limits encourage candidates to raise money from more sources, they promote the broadest possible political participation while only marginally restricting each contributor's rights to political expression. *Buckley*, 424 U.S. at 20. In the obverse, they prevent candidates without popular support from selling themselves to the highest, most potentially corrupting bidder.

In approving a campaign finance regulatory framework in which candidate spending cannot be limited, this Court has relied on the premise that the "[r]elative availability of funds is after all a rough barometer of public support". *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986) ("MCFL"); see also *Buckley*, 424 U.S. at 56 ("Given the limitation of the size of outside contributions, the financial resources available to a candidate's campaign . . . will normally vary with the size and intensity of the candidate's support."). Such an observation, however, holds true only if contribution limits ensure that individuals contribute on roughly the same order of magnitude. Otherwise, a small group of wealthy citizens will be able to amass campaign funds grossly out of proportion to their numbers or the potency of their ideas.

This Court's decisions in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), and *MCFL*, *supra*, instruct that the political arena may be

corrupted by "immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 659. Noting the compelling governmental interest in preventing corruption from "resources amassed in the economic marketplace" that are used to obtain "an unfair advantage in the political marketplace", these cases recognize that the electoral marketplace of ideas is corrupted by aggregations of wealth that are unrelated to popular support. See *MCFL*, 479 U.S. at 257. If, as *Buckley* held, the "quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing", then a restriction on the size of contributions takes nothing from the marketplace of ideas. 424 U.S. at 21. The inverse, however, is not true: without contribution limits, candidates like Fredman, who do not enjoy broad popular support, could amass wealth entirely out of proportion to the power of their ideas. As *Austin* instructs, the power of ideas in electoral politics must be measured by popular acclaim, and not by access to wealth.

If, as respondents claim, large contributions effectively determine the viability of candidacies and the outcome of elections, it follows that an electoral regime without limits significantly impairs nonwealthy citizens' opportunity for meaningful electoral participation. See Jnt. App. at 10-11 (Fredman TRO Aff. ¶¶ 6-7), at 40 (Schock Aff. ¶ 24), and at 54-55 (Fredman Aff. ¶¶ 4, 11). Citizens without disposable income cannot purchase access or representation. Accordingly, large contributions

from small numbers of people actually diminish the number of voices in the political arena. To the extent that contribution limits help mitigate the exclusionary effects of money in politics, they are justified by this Court's longstanding dedication to the "free and unfettered" functioning of the electoral marketplace of ideas.

* * *

Both the actuality and the appearance that money purchases influence over our elected representatives comprise serious threats to the integrity of our democracy. *Buckley* and its progeny recognize and revile both of these threats. Contribution limits, which provide a modest check against the possibility of corruption and thereby help diffuse the pervasive perception of corruption, remain constitutionally sound and practically necessary.

CONCLUSION

The judgment of the panel below should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1998

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Attorney General of Missouri, *et al.*,
v. *Petitioners,*

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN AND JOAN BRAY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

**BRIEF OF AMICI CURIAE COMMON CAUSE,
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In the Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN AND JOAN BRAY,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit**

**BRIEF OF AMICI CURIAE COMMON CAUSE,
DEMOCRACY 21, CAMPAIGN FOR CONSUMER
PROTECTION, CENTER FOR GOVERNMENTAL
STUDIES, LEAGUE OF WOMEN VOTERS,
NATIONAL CIVIC LEAGUE, PEOPLE FOR THE
AMERICAN WAY FOUNDATION, AND PUBLIC
CAMPAIGN IN SUPPORT OF PETITIONERS**

INTEREST OF AMICI CURIAE

Common Cause, Democracy 21, and other amici interested in campaign finance reform submit this brief amicus curiae with the consent of the parties.¹ Common

¹ Statements of interest for amici Campaign for Consumer Protection, Center for Governmental Studies, League of Women Voters, National Civic League, People for the American Way Foundation, and Public
(continued...)

Cause is a non-profit membership corporation with more than 225,000 dues-paying members nationwide. Common Cause promotes, on a non-partisan basis, its members' interest in open, honest, and accountable government and political representation. Common Cause seeks to achieve this objective by making government more responsive to citizens through government and election reform. Common Cause has participated as a party or amicus curiae in numerous Supreme Court and lower court cases concerning the constitutionality and implementation of federal and state election laws.

Democracy 21 is a non-profit, non-partisan public policy organization that favors campaign finance laws to prevent the undue influence of money in American politics and to protect the integrity of the electoral and governmental decision making process. Democracy 21 has researched the relationship between money, power, and influence in the American political process, and has participated as an amicus curiae in litigation involving the constitutionality and implementation of campaign finance laws.

SUMMARY OF ARGUMENT

In considering the constitutionality of Missouri's content-neutral campaign contribution limits of \$1075 (as of now) for statewide races and lesser amounts for other races, the Eighth Circuit should have followed this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), sustaining the constitutionality of the \$1000 limit on candidate contributions that Congress

¹ (...continued)

Campaign are attached in the appendix to this brief. Letters providing the consent of the parties are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici state that the brief in its entirety was drafted by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae, their members, or their counsel.

established in the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.*, 18 U.S.C. §§ 591 *et seq.* ("FECA"). Instead, the divided Eighth Circuit panel defiantly flouted every material aspect of *Buckley's* reasoning in reviewing Missouri's campaign contribution limits.

While *Buckley* characterized campaign contributions as speech by proxy and contribution limits as a "marginal restriction" on a contributor's free speech that could therefore be enacted on the basis of less compelling justifications, 424 U.S. at 20-21, the Eighth Circuit expressly applied "strict scrutiny" in judging Missouri's limits, *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d 519, 521 (8th Cir. 1998).

While *Buckley* found that the federal government had compelling interests in controlling the dangers of real and apparent corruption that it found to be "inherent" where campaign contributions are unlimited, 424 U.S. at 28-30, the Eighth Circuit required Missouri to support its limits with detailed evidence of specific incidents of corruption relating to contributions above \$1075 and then ignored probative record evidence to that effect, 161 F.3d at 521-22.

While *Buckley* held that courts should not second-guess, fine tune, or use a "scalpel to probe" the wisdom of the precise limit a legislature chooses, except in the rare circumstances where specific evidence demonstrates that the limits are so low that candidates cannot raise enough money to campaign, 424 U.S. at 21, 30, Chief Judge Bowman went so far as to state that the Eighth Circuit should substitute its judgment for that of the Missouri legislature based on a dubious inflation analysis, and he then ignored record evidence that many Missouri candidates had raised *more* money under the limits than they had in previous elections, 161 F.3d at 522-23.

For all these reasons, the Eighth Circuit's judgment should be reversed.

ARGUMENT

I. This Case Falls Squarely Within This Court's Holding in *Buckley v. Valeo* That Courts Should Defer to Legislative Line-Drawing in Setting Limits on Campaign Contributions.

Buckley v. Valeo, 424 U.S. 1 (1976), governs the disposition of this case. In *Buckley*, the Court upheld a \$1000 federal contribution limit and prescribed general principles governing how courts should evaluate the constitutionality of contribution limits. Drawing a distinction between contributions and expenditures, *id.* at 19-22, the Court explained that the communicative quality of a contribution rests with the symbolic act of contributing and not with the amount of the contribution. *Id.* at 21. On this basis, the Court held that “[a] limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication” *Id.* (footnote omitted); *see also Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) (plurality opinion) (reiterating that “restrictions on contributions impose ‘only a marginal restriction upon the contributor’s ability to engage in free communication’”) (quoting *Buckley*, 424 U.S. at 20-21).

Having concluded that contribution limits impose only a marginal restriction on speech, *Buckley* further held that the government’s interest in “the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office” was sufficient to uphold the \$1000 federal contribution limit. 424 U.S. at 25. The Court recognized the significant danger that large contributors can secure political quid pro quos from candidates in a system of private election financing. Significantly, “[o]f almost equal concern” to the Court was

“the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.” *Id.* at 27. The Court found these dangers to be both grave and “*inherent* in a system permitting unlimited financial contributions.” *Id.* at 28 (emphasis added); *see also id.* at 30, 29 (“Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse *inherent* in the process of raising large monetary contributions be eliminated,” and the interest in preventing those harms is constitutionally “sufficient” to justify contribution limits (emphasis added)).

Because contribution limits involve “little direct restraint on . . . political communication” and the government’s interest in limiting contributions is so strong, *id.* at 21, 29, *Buckley* held that courts must defer to legislative determinations that particular contribution limits make sense. In *Buckley*, and thereafter, the Court has declared that courts may not second-guess legislative judgments or substitute their own judgment for that of the legislature when reviewing campaign contribution restrictions that apply to candidate elections: “‘If it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000.’” *Id.* at 30 (quoting *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975)); *see also FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982). Even though other, higher limits might have been effective in certain elections and even though the limits might have been structured to take account of the particular office at stake, “Congress’ failure to engage in such fine tuning [did] not invalidate the legislation.” *Buckley*, 424 U.S. at 30.

Hence, *Buckley* wisely declined to plunge courts into the morass of evaluating the wisdom of the specific contribution limits a legislature prescribes. *Buckley* recognized only a

narrow exception to this rule of judicial deference: a contribution limit may violate the First Amendment if it is so low that distinctions in degree between it and alternative contribution ceilings “can be said to amount to differences in kind,” *Buckley*, 424 U.S. at 30, such that it “prevent[s] candidates . . . from amassing the resources necessary for effective advocacy,” *id.* at 21.

These basic principles established in *Buckley* remain bedrock constitutional law: Contribution limits involve relatively little direct restraint on speech, they serve the constitutionally sufficient interest of minimizing the risks of actual and apparent corruption inherent in a system of unlimited campaign contributions, and courts should therefore largely defer to legislatures when it comes to assessing the wisdom of a particular limit. See, e.g., *Colorado Republican*, 518 U.S. at 614-15 (plurality opinion); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *California Med. Ass’n v. FEC*, 453 U.S. 182 (1981) (plurality opinion).

II. The Eighth Circuit’s Decision Striking Down Missouri’s Contribution Limits Flouts *Buckley v. Valeo*.

In striking down the content-neutral contribution limits the Missouri legislature prescribed, the Eighth Circuit Court of Appeals altogether disregarded every important aspect of *Buckley*’s holdings concerning judicial evaluation of campaign contribution limits.

A. The Eighth Circuit Used Strict Scrutiny, Notwithstanding *Buckley*.

The Eighth Circuit’s first error was its application of “strict scrutiny” to Missouri’s contribution limits. *Shrink Missouri Gov’t PAC*, 161 F.3d at 521. *Buckley* articulated and applied a less exacting constitutional standard for

evaluating the constitutionality of contribution limits. And, since *Buckley*, this Court has never used strict scrutiny to evaluate a campaign contribution limit. As the Court recalled in *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 259-60, “[w]e have consistently held that restrictions on [direct] contributions require less compelling justification than restrictions on” spending. See also *California Med. Ass’n*, 453 U.S. at 196 (plurality opinion) (“speech by proxy” is not “entitled to full First Amendment protection”).² Thus, the Eighth Circuit fatally erred when, defying *Buckley*, it insisted that the State of Missouri had to establish a “compelling state interest” for enacting campaign contribution limits and had to defend the limits it chose as “narrowly drawn to serve that interest.” 161 F.3d at 521.

B. The Eighth Circuit Required Specific Proof of Corruption, Notwithstanding *Buckley*.

The Eighth Circuit compounded this reversible error by requiring the State to provide detailed evidence of “a real problem with corruption or a perception thereof as a direct result of large campaign contributions,” 161 F.3d at 522. Rejecting the premise thrice repeated in *Buckley* that at least the appearance of corruption is “inherent,” *Buckley*, 424 U.S. at 25, 28, 30, the Eighth Circuit instead improperly required

² The Court’s less exacting standard for evaluating contribution limits is consistent with the standard the Court has applied in more recent First Amendment challenges to other election legislation. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), upholding a ban on “fusion” candidates, the Court weighed the nature of the burden on associational rights against the state’s interest, and observed that:

Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Id. at 358 (internal quotations and citation omitted); see also *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (upholding ban on write-in voting).

"some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." 161 F.3d at 521 (citation omitted).

As shown, *Buckley* did not require Congress to support its conclusion that prophylactic limits were needed with case-specific evidence of actual or apparent corruption from large contributions. Wisely side-stepping that quagmire, the Court concluded that at least the appearance of corruption is "inherent" in a campaign finance system that lacks contribution limits. While the Court cited the abuses in campaign financing during the 1972 elections, those examples were not the basis for the Court's decision. Rather, the Court cited these examples to confirm what it deemed intuitively evident. *Buckley*, 424 U.S. at 27 (examples from 1972 elections confirmed that the problem was "not an illusory one"). The Court noted the obvious: "the scope of such pernicious practices can never be reliably ascertained." *Id.* For these sound reasons, the Court deferred to Congress' choice of particular limits: "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.* (citation omitted). This Court has never endorsed any other method for judicial evaluation of campaign contribution limits.

Indeed, in other First Amendment and election law contexts where the Court has found a limited impingement on protected expression, the Court has relied on common sense, reasonableness, and historical experience to conclude that government action is justified to prevent certain dangers. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 206, 211 (1992) (discussing the historical experience and upholding legislation setting limits on campaigning in close proximity to voting booths because of "[a] long history, a substantial consensus, and simple common sense").

These cases teach that in such contexts it is simply not necessary for the government to offer systematic, empirical evidence of harm in particular instances where history and reasonableness show that the dangers the government seeks to prevent are obvious. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628-29 (1995) ("[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, [the Court has] permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus and 'simple common sense.'" (citations omitted)); see also *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion) ("[W]hen trenching on First Amendment interests, even incidentally, the government must be able to adduce *either* empirical support *or* at least sound reasoning on behalf of its measures." (quoting *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987)) (emphases added)); *FCC v. League of Women Voters*, 468 U.S. 364, 401 n.27 (1984) (Hatch Act "evolved over a century of governmental experience with less restrictive alternatives that proved to be inadequate to maintain the effective operation of government" (citation omitted)).³

³ It was significant to the Court's analysis in *Burson*, *Buckley* and other cases that the restrictions adopted by the government did not "significantly impinge on constitutionally protected rights" of expression. *Burson*, 504 U.S. at 209-10. Where the Court has required detailed evidence of harm to justify a regulation, it is because the government's need for regulation has not been obvious and because the burden imposed by the regulations has more directly and significantly impinged upon protected expression. For example, in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the Court struck down a ban on the acceptance of honoraria by lower ranking government officials. In (continued...)

Buckley is also consistent with other cases holding that courts should afford significant deference to a legislature's predictive judgments that certain laws are necessary to combat perceived evils. See, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights."); *National Right to Work Comm.*, 459 U.S. at 210 ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

With regard to the issues at stake here, there is voluminous historical and experiential support for the

³ (...continued)

reaching its conclusion that the direct and substantial restrictions on speech in that case were not sufficiently justified, the Court reasoned that the danger of harm from speeches or articles by low-ranking executive officials was far from clear or evident, and that the government's concerns about potential harm were undermined by exceptions in the law and Congress' failure to require any connection between the honoraria at issue and the employee's job.

Similarly, while the Court in *Turner Broadcasting System* reaffirmed that "courts must accord substantial deference to the predictive judgments of Congress," 512 U.S. at 665 (plurality opinion), the Court recognized that the government's concerns about the viability of local television broadcasting and economic justification for the substantial speech restrictions of the "must-carry" rules were far from clear or self-evident. To the contrary, evaluating the proposed restrictions necessitated a complex economic analysis that had not been sufficiently demonstrated.

In *Colorado Republican*, the Court, relying on *Buckley*, found that while contribution limits directly furthered the government's interest in preventing the potential corruption caused by large campaign contributions, limits on truly independent party expenditures did not. 518 U.S. at 611-17. It was under these circumstances -- the absence of any evidence of a "special" corruption problem that stemmed from political party independent expenditures -- that *Colorado Republican* refused to assume that limits on party expenditures were necessary. *Id.* at 611-13.

proposition that the dangers of actual and apparent corruption are inherent and threaten confidence in government where there are no limits on campaign contributions to candidates. Large campaign contributions from corporations to Theodore Roosevelt's 1904 presidential campaign were the impetus for the Tillman Act of 1907, Pub. L. No. 50-37, 34 Stat. 864, which prohibited corporations and national banks from contributing to candidates for federal election. *National Right to Work Comm.*, 459 U.S. at 209 (discussing history of the Tillman Act); see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 811-12 (1978) (White, J., dissenting); *Massachusetts Citizens For Life, Inc.*, 479 U.S. at 246-47 (discussing history of Congressional limits on corporate expenditures in connection with campaigns). Similarly, Congress enacted the disclosure requirements of the Federal Corrupt Practices Act of 1925 in response to the Teapot Dome scandal. See *National Right to Work Comm.*, 495 U.S. at 209. That scandal involved large, unreported gifts and loans to federal officials made by oil developers in non-election years to secure the leasing of naval oil reserves to private companies. In 1966, a campaign contribution scandal erupted when members of the Democratic "President's Club," which included government contractors, gave more than \$1000 each to President Johnson's campaign. *Buckley*, of course, noted the unfortunate practices in the 1972 presidential election. 424 U.S. at 26 & n.28; see also E. Joshua Rosenkranz, *Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 23-24 (1998) [hereinafter "Rosenkranz"] (discussing examples of corruption in campaign contributions that led to the adoption of the FECA).

Today, the dangers of actual and apparent corruption associated with large campaign contributions continue to

abound because of the so-called "soft money" loophole.⁴ In one particularly redolent example, in April of 1997 Amway President Richard DeVos and his wife, Bev DeVos, contributed a total of \$1 million to the Republican National Committee in soft money contributions. Later that year, with "the help of House Speaker Newt Gingrich (R-Ga.)," Amway benefited when a joint conference committee controlled by a majority of Republicans inserted a special tax break for Amway into the 1998 federal budget during a late night conference. Ruth Marcus, *Lobbying's Big Hitters Go to Bat; Some Swat Home Runs, Others Strike Out on Budget Deal*, Washington Post, Aug. 3, 1997, at A1.⁵

Roger Tamraz's efforts to secure the United States' "backing for his oil pipeline project in the Caucasus" provide another example of the inherent appearance of corruption that accompanies large campaign contributions. *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, Final Report of the Committee on Governmental Affairs, S. Rep. No. 105-167, Report

⁴ "Soft money" refers to contributions that are made to political parties ostensibly for uses other than in connection with federal elections, but that, in practice, are used to support federal candidates. For this reason, the Federal Election Commission, which allowed this loophole to open in a 1978 Advisory Opinion, FEC Advisory Opinion 1978-10, has recently opened a new rulemaking proceeding to consider means to close the loophole, see *Prohibited and Excessive Contributions; "Soft Money,"* 63 Fed. Reg. 37,722 (1998) (to be codified at 11 C.F.R. pts. 102, 103 & 106) (proposed July 13, 1998), and Members of Congress in both bodies have introduced legislation to ban soft money contributions, see *Bipartisan Campaign Finance Reform Act of 1999*, Title I, H.R. 417, 106th Cong. (1999) (Shays-Meehan bill); *Bipartisan Campaign Finance Reform Act of 1999*, Title I, S. 26, 106th Cong. (1999) (McCain-Feingold bill).

⁵ The new provision changed the rules for determining whether the assets of Amway's two Asian subsidiaries are subject to taxation and is estimated to be worth millions of dollars to Amway. Amway admits that the provision particularly benefited it. See *id.*

Summary at 43 (1998). Tamraz gave \$300,000 in soft money donations to the Democratic National Committee, concededly for the purpose of securing access to and support from high ranking executive branch officials. When the National Security Council opposed Tamraz's "scheme as untenable and harmful to U.S. foreign policy interests," it received the following advice: Tamraz has "already given \$200,000, and if he got [what he wanted] he would give the DNC another \$400,000." *Id.* at 44 (alteration in original). Tamraz frankly admitted to a congressional committee investigating corruption in campaign financing that he gave to buy access to the President. In fact, Tamraz met with President Clinton on at least six occasions. *Id.* at 43-44.

As if the public's concerns about corruption in our political system are not already heightened, it appears now that the role of large campaign contributions in our federal elections may even be further threatening our national security. It has only recently been reported that the head of China's military intelligence program, General Ji Shengde, funneled \$300,000 in soft money contributions to Democratic fundraiser Johnny Chung, according to Chung. See William C. Rempel, *et al.*, *Testimony Links Top China Official, Funds for Clinton*, Los Angeles Times, Apr. 4, 1999, at A1.⁶

Contributors are not the only ones to acknowledge the unfortunate link between large contributions and the appearance of corruption -- legislators recognize and lament it as well. See generally Martin Schram, *Speaking Freely: Former Members of Congress Talk About Money in Politics* (1995) (interviewing current and former Members of Congress from both major parties). As former Georgia

⁶ Johnny Chung has reportedly told federal investigators that he met with the intelligence official from China on three occasions and used part of the money deposited in his bank account to subsidize campaign contributions to the Democratic National Committee in an effort to assist President Clinton's reelection efforts in 1996. See *id.*

Senator Wyche Fowler confessed, "I am sure that on many occasions -- I'm not proud of it -- I made the choice that I needed this big corporate client and therefore I voted for, or sponsored its provision, even though I did not think that it was in the best interests of the country or the economy." *Id.* at 28 (quoting Wyche Fowler). Former Congressman Vin Weber of Minnesota has said that "[w]hen you raise money from PACs, members have almost a mental checklist of the things they need to do to make sure their PAC contributors continue to support them." *Id.* at 3 (quoting Vin Weber).

Ominously for the health of our participatory democracy, voters believe that large campaign contributions buy influence for the contributor. One recent poll shows that 77% of Americans think that special interests carry more weight with federal lawmakers than the best interests of the country. *See, e.g., Lydia Saad, Americans Not Holding Their Breath on Campaign Finance Reform*, Gallup Poll, Oct. 11, 1997; *see also* Rosenkranz at 16 (reporting that in three polls, three-quarters of respondents agreed that "Congress is largely owned by the special interest groups," that "[s]pecial interest groups have too much influence over elected officials," and that "[o]ur present system of government is democratic in name only. In fact, special interests run things"). The result is a sharp decrease in the confidence of our citizens in their government. *See, e.g., id.* at 17 (reporting "shockingly low" voter turnout in 1994 congressional races and 1996 presidential election).

In short, the dangers of actual and apparent corruption arising from large contributions have not diminished. It is just as obvious today as it was to Congress in 1974 and to the Court in 1976 when the Court wrote in *Buckley* that "the avoidance of the appearance of improper influence 'is [] critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565

(1973)); *see United States v. UAW-CIO*, 352 U.S. 567, 575 (1957) ("[S]ustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" is a critical government interest.).

Thus, the Eighth Circuit committed reversible error when it required Missouri to prove specific instances of corruption or the appearance thereof to justify the state's contribution limits. As Judge Gibson observed in his dissent, "[i]t is hardly counterintuitive that large campaign contributions might corrupt politics and invite public cynicism. The State has imposed only modest restrictions on political speech, and it need not justify them with scientific precision." *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d at 526 (Gibson, J., dissenting).

Not only did the Eighth Circuit apply the wrong standard, in doing so, it also blinded itself to a factual record that, to the district court's satisfaction, established Missouri's strong interest for enacting its contribution limits.⁷ State Senator Wayne Goode, co-chair of the Interim Joint Committee on Campaign Finance Reform, testified by affidavit that the Committee had "heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence" and that contributions in excess of the limits "have the appearance of buying votes as well as the real potential to buy votes."

⁷ The district court, applying the Eighth Circuit's erroneous "strict scrutiny" standard, held that "[i]f a showing of 'real harm' is required (the State claims it is not), the Court finds that defendants have made that showing." 5 F. Supp. 2d at 737.

Shrink Missouri Government PAC v. Adams, 5 F. Supp. 2d 734, 738 (E.D. Mo. 1998).⁸

In addition, the district court referenced several newspaper stories and editorials to support the Senator's statements. One article reported that a candidate for state auditor had received a \$40,000 contribution from a brewery and a \$20,000 contribution from a bank; another observed that the state treasurer's selection of a bank to do state business raised an appearance of favoritism, because the bank had contributed approximately \$20,000 to the treasurer during his last campaign. *See id.* at 738 n.6. Moreover, the appearance of corruption was clear: Missouri citizens had voted overwhelmingly for the significantly lower Proposition A limits that the Eighth Circuit invalidated in *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995). This evidence suffices to sustain the limits, particularly since the serious problem it exemplifies has been held to be inherent where there are no limits on campaign contributions.⁹

⁸ The Missouri legislature neither collects nor preserves legislative history.

⁹ It is hard to see how on this record the Eighth Circuit could have granted summary judgment against the State. Summary judgment is only appropriate where the court concludes, after reviewing all of the record before it and viewing that evidence in the light most favorable to the nonmoving party, that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (holding that the evidence "must be viewed in the light most favorable to the party opposing the motion" (internal quotation and citation omitted)).

C. *There Is No Evidence That the Limits Missouri Selected Are So Low That They Significantly Impinge on Political Dialogue by Preventing Candidates from Amassing the Resources Necessary for Effective Campaigning.*

Because Missouri's interest in preventing real or apparent corruption is constitutionally sufficient to justify its decision to impose some contribution limits, courts have no "scalpel to probe" the particular limits the Missouri legislature set -- those limits are entitled to considerable judicial deference. *Buckley* could not have been clearer on this point. 424 U.S. at 30; *see Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir.) (upholding Kentucky's \$1000 contribution limit), *cert. denied sub nom. Kentucky Right to Life, Inc. v. Stengel*, 118 S. Ct. 162 (1997). Thus, courts may not second-guess legislative judgments regarding the degree of appropriate prophylaxis unless a plaintiff proves on the basis of empirical evidence that the limits the legislature chose are in fact so low that they amount to "differences in kind" that prevent candidates from amassing sufficient funds for effective campaigning. *Buckley*, 424 U.S. at 21, 30.

To make the showing *Buckley* requires, a plaintiff must carry his burden of proof through specific evidence like that before the district court in *National Black Police Ass'n v. District of Columbia Board of Elections and Ethics*, 924 F. Supp. 270 (D.D.C. 1996), *vacated as moot by* 108 F.3d 346 (D.C. Cir. 1997) (invalidating District of Columbia \$100 contribution cap). There, the evidence proved three facts to the court's satisfaction: (1) a large percentage of contributors had given amounts in excess of the \$100 cap before that cap was imposed; (2) candidates' total fundraising receipts decreased significantly after the \$100 cap was imposed; and (3) the amounts candidates raised under the \$100 cap were "insufficient to promulgate candidates' political messages." *Id.* at 275. Concluding that the first two facts were not

sufficient to invalidate the \$100 cap, the court rested its decision on the crucial last factor. *Id.* at 277.¹⁰ No lower court outside the Eighth Circuit has struck down a contribution limit without making such a finding, and no such court has ever invalidated statewide limits higher than \$500.

Respondents have not made the requisite showing -- indeed, the record evidence proves exactly the opposite! As the district court specifically found, Missouri's limits have in fact had no material adverse effect on the ability of candidates to speak and to run for office. The evidence from the 1992 and 1996 elections shows that only a small fraction of contributors had given more than the limits before Missouri enacted those limits. 5 F. Supp. 2d at 741. Likewise, the evidence shows that candidates for state office were in fact able to raise sufficient funds to conduct effective campaigns despite the limits. *Id.* at 740-41. With the limits in effect, candidates for many Missouri state offices *raised more money* than they had in previous elections. Average candidate expenditures increased in four of the five races for which the State collected data between 1992 and 1996. (See J.A. at 24-28.) Total candidate expenditures increased significantly as well: Between 1992 and 1996, total expenditures in the general elections increased 76% in the Lieutenant Governor

¹⁰ A district court granted a preliminary injunction enjoining enforcement of California's contribution limits of \$500 per election for statewide candidates on the basis of similar reasoning:

Plaintiffs have tendered a wealth of factual and opinion evidence in support of their position. The court has found myriad facts which, taken together, require the court to conclude that on the record made at trial the effect of the initiative is not only to significantly reduce a California candidate's ability to deliver his or her message, but in fact to make it impossible for the ordinary candidate to mount an effective campaign for office.

California Prolife Council Political Action Comm. v. Scully, 989 F. Supp. 1282, 1297 (E.D. Cal. 1998) (footnote omitted), *aff'd*, 164 F.3d 1189 (9th Cir. 1999).

campaign (from \$1,008,047 to \$1,777,872), 398% in the race for Secretary of State (from \$316,161 to \$1,576,471), and 89% in the Treasurer's race (from \$193,088 to \$365,486). (See J.A. at 25-27.)

Furthermore, experience of more than twenty years under the federal \$1000 contribution limit (slightly lower than the Missouri limit at issue) shows that it has not prevented federal candidates from building significant and steadily increasing campaign coffers. Federal Election Commission ("FEC") data show that total contributions from individuals have grown steadily since 1975 when the limits first went into effect. During the 1997-1998 election cycle, individual contributions (totaling \$372.44 million) were 5.7 times the total individual contributions during the 1975-1976 election cycle (\$65.12 million).¹¹ These data are for contributions subject to the federal contribution limit, and exclude "soft money" contributions that escape federal regulation.

Nor is inflation itself relevant to the constitutional analysis. The federal contribution limits *Buckley* upheld in 1976 remain in effect today, and at no time has the Court suggested that the passage of time has made them constitutionally suspect. Attempting to apply debatable inflation factors to those limits would require just the judicial "fine tuning" that the Court expressly proscribed in *Buckley*.¹²

¹¹ Compare 1998 Congressional Financial Activity Declines, FEC Press Release (Dec. 29, 1998) with FEC Disclosure Series No. 6: 1976 Senatorial Campaigns Receipts and Expenditures (Apr. 1977) and FEC Disclosure Series No. 9: 1976 House of Representatives Campaigns Receipts and Expenditures (Sept. 1977). Even as adjusted for inflation, individual contributions during the 1997-1998 election cycle were twice as much as the total contributed by individuals during 1975 and 1976.

¹² The problem of accounting for inflation is exacerbated by the practical difficulties of choosing the proper method of calculation. See 5 F. Supp. 2d at 742.

In addition, general inflation statistics do not answer the only germane constitutional question -- whether particular limits in a particular jurisdiction are so unreasonably low that they in fact prevent effective campaign advocacy in that jurisdiction. The amount of money necessary to campaign effectively is subject to a potentially infinite number of variables. Campaigning methods change over time, and differ from jurisdiction to jurisdiction, campaign to campaign, and office to office. The use of new campaign techniques in recent elections -- including, in particular, the Internet and e-mail -- shows that the costs of campaigning in real money terms can decrease as well as increase.¹³ See, e.g., Ron Faucheux, *How Campaigns Are Using the Internet: An Exclusive Nationwide Survey*, Campaigns & Elections, Sept. 1998, at 22 (reporting that, of the 1998 campaigns surveyed, over 63% had websites); see also Lance Gay, *Campaigning on the Internet*, Business Today, Oct. 23, 1998; Peter Lewis, *Web Campaigning Gains Ground*, Seattle Times, Oct. 17, 1998, at A1.

The question for constitutional purposes is not what \$1000 in 1976 dollars can buy today, but rather whether the limit chosen by the legislature is today preventing candidates from effectively communicating with the electorate. While a legislature may legitimately include an inflation adjustment in campaign contribution limits, as the Missouri legislature did, that is purely a matter of legislative discretion.

¹³ As the district court observed:

[T]he CPI cannot, by definition, reflect increases in the cost of non-consumer services such as conducting a mass-mailing, operating a telephone bank, or running a thirty-second radio or television advertisement. And if some or all of those costs have risen, perhaps they are offset, at least to some degree, by post-1976 technological advances such as the fax machine, e-mail, and the Internet

Shrink Missouri Gov't PAC, 5 F. Supp. 2d at 742.

Otherwise, the courts would find themselves engaged in a perpetual and ultimately futile review of the economics of campaign financing and the myriad and changing factors related thereto. That type of analysis intrudes on legislative policymaking and is not a constitutional requirement.

CONCLUSION

For these reasons and those stated by petitioners, we respectfully urge the Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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April 12, 1999

APPENDIX

**STATEMENT OF INTEREST OF THE CAMPAIGN
FOR CONSUMER PROTECTION**

The Campaign for Consumer Protection is an association of eighteen state-based citizen organizations working to promote the public interest through state and federal legislative reforms on a wide range of consumer and environmental issues. We believe reasonable campaign spending limits are essential to restoring public confidence in the legislative system.

STATEMENT OF INTEREST OF THE CENTER FOR GOVERNMENTAL STUDIES

Applicants Robert M. Stern, Co-Director and General Counsel, and Craig B. Holman, Ph.D., Project Director, Center for Governmental Studies ("CGS"), request leave to file on behalf of CGS as amicus curiae in this case in support of petitioners. The Center for Governmental Studies is a non-profit, non-partisan tax exempt organization which researches, drafts and helps implement innovative approaches to improve democratic governance at the federal, state and local levels. During the past fifteen years, Mr. Stern, Dr. Holman and CGS staff have created a statewide blue-ribbon commission, the California Commission on Campaign Financing, and a national organization, the National Resource Center for State & Local Campaign Financing, to develop well-reasoned campaign finance initiatives, legislation and ordinances.

STATEMENT OF INTEREST OF THE LEAGUE OF WOMEN VOTERS

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. The League is organized in one thousand communities and in every state, with approximately 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, that protects individual liberties established by the Constitution, and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local and federal levels for more than two decades.

STATEMENT OF INTEREST OF THE NATIONAL CIVIC LEAGUE

The National Civic League is interested in maintaining flexibility for local jurisdictions to adopt campaign finance reform that best fits the needs of the community. There are at least 75 local jurisdictions (cities and counties) that have imposed limits on campaign contributions and/or campaign spending. Contribution limits in those communities range from \$50 to \$7,500. The 75 communities themselves are very diverse in population, geographic location, form of government, size of the legislative body, wealth, ethnic and racial makeup, and political history, to name just some of the factors that should determine an appropriate contribution limit. No one set of rigid rules for state and federal races could fairly apply to all 75 of those local jurisdictions.

STATEMENT OF INTEREST FOR PEOPLE FOR THE AMERICAN WAY FOUNDATION

People For the American Way Foundation ("People For") is a nonpartisan, citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious and educational leaders devoted to our nation's heritage of pluralism, liberty, and participatory democracy, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed amicus curiae briefs before this Court in important First Amendment and civil rights litigation. In addition, People For has been actively involved in efforts to increase voter registration and citizen participation in the democratic political process, including litigating cases to enforce the National Voter Registration Act of 1993. People For has joined in filing this brief to help vindicate the important governmental interest in protecting the integrity of our system of participatory democracy in a manner consistent with First Amendment values and principles.

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STATEMENT OF INTEREST FOR PUBLIC CAMPAIGN

Public Campaign is a non-profit, non partisan organization based in Washington, D.C. that is dedicated to fundamental reform of America's campaign finance systems at the municipal, state, and federal levels. Public Campaign believes that such reform must accord with the democratic principles of political equality and public accountability so that qualified candidates for elected office are not excluded or disadvantaged because they have less access to campaign money and governmental policy decisions are not skewed in favor of narrow private interests because of elected officials' dependence on their campaign contributors. For this reason, Public Campaign advocates reform that offers candidates willing to reject private contributions the option of receiving full and equal amounts of public funding. Public Campaign serves as a coordination and resource center for citizen groups pursuing this approach to reform in forty states, including Missouri. Public Campaign takes an interest in this case because of its implications for the ability of legislatures to enact effective campaign finance reform based on reasonable assumptions about the nature and extent of the problems caused by existing campaign finance systems.

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No. 98-963

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON, *et al.*,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC, *et al.*,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit**

**BRIEF FOR AMICI CURIAE SENATOR JOHN F. REED,
CONGRESSMAN JOHN M. SPRATT, JR., CONGRESSMAN AMO
HOUGHTON, CONGRESSMAN SHERWOOD BOEHLERT,
CONGRESSMAN ALLEN BOYD, SENATOR MAX CLELAND,
SENATOR SUSAN M. COLLINS, SENATOR TOM DASCHLE,
SENATOR RICHARD J. DURBIN, CONGRESSMAN SAM FARR,
SENATOR RUSSELL D. FEINGOLD, CONGRESSMAN
MAURICE HINCHEY, SENATOR CARL LEVIN, SENATOR
JOHN McCain, CONGRESSWOMAN CAROLYN B. MALONEY,
CONGRESSMAN JAMES H. MALONEY, CONGRESSMAN
MARTIN MEEHAN, CONGRESSMAN GEORGE MILLER,
CONGRESSWOMAN JANICE D. SCHAKOWSKY,
CONGRESSMAN CHRISTOPHER SHAYS, CONGRESSMAN
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INTEREST OF AMICI¹

Amici include the following Members of the United States Senate and the United States House of Representatives: Senator John F. Reed, Congressman John M. Spratt, Jr., Congressman Amo Houghton, Congressman Sherwood Boehlert, Congressman Allen Boyd, Senator Max Cleland, Senator Susan M. Collins, Senator Tom Daschle, Senator Richard J. Durbin, Congressman Sam Farr, Senator Russell D. Feingold, Congressman Maurice Hinchey, Senator Carl Levin, Senator John McCain, Congresswoman Carolyn B. Maloney, Congressman James H. Maloney, Congressman Martin Meehan, Congressman George Miller, Congresswoman Janice D. Schakowsky, Congressman Christopher Shays, Congressman John F. Tierney, and Congressman Anthony D. Weiner.

The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.*, one of several campaign finance reforms passed by Congress, contains limits on campaign contributions similar to the Missouri state limits at issue in this case. *Amici*, a bipartisan group of present Senators and Representatives, believe that such contribution limits are essential, even if not independently sufficient, to maintain the public's confidence in the integrity of our political system. The Eighth Circuit's decision striking down such limits departs from *Buckley v. Valeo*, which upheld the FECA limits.

The personal experiences of *amici* since this Court's decision in *Buckley* demonstrate not only the necessity of the contribution limits upheld in that case, but also the need for clearer and more comprehensive authority to stem the evasion of those limits and to vindicate the central premise in *Buckley* --

¹The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or counsel contributed money or services to the preparation or submission of this brief.

that the government does have a compelling interest in ensuring faith in the integrity of the political process. *Amici* advocate, and seek to enact, reforms to vindicate that compelling interest. As both representatives of the People and seasoned participants in the electoral process, *amici* believe they are entitled to broad deference in the regulation of federal elections. The Court in *Buckley* properly accorded legislatures such deference with regard to contribution limits. The Court should reaffirm that deference as to the contribution limits at issue here and extend it to campaign finance reforms in general. Without additional reforms, the public's faith and participation in the political process will continue to decline. Such reforms can be enacted without infringing upon First Amendment rights and without stifling the public debate essential to the functioning of our democracy.

SUMMARY OF ARGUMENT

This is a case of great moment. In the decision under review, the Eighth Circuit has refused to follow the clear holding of *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* upheld against a First Amendment challenge campaign contribution limits indistinguishable in substance from the state legislation invalidated by the Eighth Circuit in this case. Upholding such restrictions, the *Buckley* Court made clear that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" 424 U.S. at 27 (*quoting United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). The Eighth Circuit's holding thus should be reversed on the authority of *Buckley*. More fundamentally, the Eighth Circuit's readiness to ignore the plain import of *Buckley* suggests that this Court's First Amendment jurisprudence regarding campaign finance regulation is in need of clarification. Nothing in the more than two decades of experience since *Buckley* calls into question the Court's decision to uphold the legislative judgment that campaign contribution limits are essential to preserving the public's faith in the electoral process and our representative institutions. To the contrary, the problem with the Court's campaign finance doctrine is that it has become a straitjacket disabling the People's elected representatives from responding meaningfully to the threat of disastrous erosion of public confidence posed by other uses of money in the political process -- a threat that grows more serious with each election cycle. This doctrinal hostility to legitimate efforts to preserve the integrity of the political process (which, as the Eighth Circuit's decision makes plain, now threatens even to undermine *Buckley*'s clear holding that contribution limits are constitutional) has gone too far. "[F]or while the Constitution

protects against invasions of individual rights, it is not a suicide pact" requiring Congress and state legislatures to stand helplessly by as the public's faith in democracy withers away. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

1. The Eighth Circuit can and should be reversed on the narrow ground that the Missouri contribution limits at issue in this case are indistinguishable from the limits upheld in *Buckley*. Missouri's contribution limits satisfy the reasoning and standard of review of *Buckley*, because the Missouri legislature made clear that it was acting to address voters' declining faith in the integrity of the political system. In addition, *Buckley*'s precise holding supports Missouri's limits. *Buckley* upheld an individual contribution limit of \$1,000. Thus, Missouri's individual contribution limit of \$1,075 must be permissible, particularly given the generally higher costs associated with federal as opposed to statewide elections. The effects of inflation since 1976 make no difference to the viability of the \$1,000 limit, because the *Buckley* Court declared that future courts could reject contribution limits only if they "differed in kind" from the limits upheld in *Buckley*. As the Missouri limits still allow contributors the ability to express their support for their chosen candidates and allow candidates to mount viable campaigns, those limits do not differ in kind from the federal limits.

2. Although Missouri's contribution limits clearly pass muster under *Buckley*, the Eighth Circuit's erroneous decision to the contrary demonstrates the need for this Court to reexamine its campaign finance jurisprudence. The First Amendment should not be read to strip the majoritarian branch of government of the ability to protect the integrity of the political process. The accumulated experience of Members of Congress, reinforced by empirical evidence, is that the dominance of money in politics seriously threatens the public's

faith in the legitimacy of government and in the elections that choose whom shall govern. There must be leeway for the government to address the core societal interest, recognized by this Court, see *Buckley*, 424 U.S. at 26-27, in ensuring the integrity -- in every sense of the word -- of our representative system of government.

This leeway can be provided, consistent with the First Amendment, in two ways. First, strict scrutiny should not apply to any campaign finance reform that is justified by reference to something other than the communicative impact of speech. That is clear from this Court's First Amendment jurisprudence since *Buckley*. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994) ("*Turner I*"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Ordinarily, campaign finance reforms are designed to regulate the underlying activities that generate the speech at issue, not the speech itself. Accordingly, these reforms should be reviewed under intermediate scrutiny. See *Turner I*, 512 U.S. at 642-43.

Second, legislatures should be given substantial deference to design and enact campaign finance reforms. *Buckley* provided such deference with regard to contribution limits, and the practical experience of *amici* since *Buckley* with respect to other types of campaign reform has demonstrated that deference is warranted for all such reforms. Justice White was correct: the Court should defer to the "many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). The Court should allow vindication of the predictive judgments of legislatures as to what reforms will sustain faith in the electoral process. As this Court has recognized, legislatures should not be held to a standard of proof that "would necessitate that a State's political system sustain some level of

damage before the legislature could take corrective action.” *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)).

The judgment below should be reversed.

ARGUMENT

I. MISSOURI'S LIMITATIONS ON CAMPAIGN CONTRIBUTIONS ARE CONSTITUTIONAL AS A MATTER OF SETTLED LAW.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court confronted exactly the sort of limit on campaign contributions enacted by the Missouri legislature in this case. The *Buckley* Court upheld FECA's federal contribution limits against First Amendment challenge. *See id.* at 24-30. The rationale for contribution limits validated in *Buckley* was right in 1976, remains right today, and controls here.

The *Buckley* Court confirmed that the government has a compelling interest in combating real and perceived political corruption. “To the extent that large contributions are given to secure political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.” *Id.* at 26-27. In addition, the Court recognized the danger of “the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.” *Id.* at 27. These concerns were well-founded. In a market-oriented society, a campaign finance system that permits individuals to make large contributions fosters the perception that only contributors have a voice in the democratic process. That perception fulfills itself by alienating voters and discouraging them from participating in the process. As a result, the perception of a chasm between the interests of the people and

the priorities of their elected representatives is created, and public confidence in government corrodes.

Recognizing the compelling government interests at stake, *Buckley* held that contribution limits were a “closely drawn” means to address those interests: “contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions.” *Id.* at 25, 28. This is so because “the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling.” *Id.* at 29.² The Missouri legislature enacted the contribution limits at issue in this case to address the same compelling interests at stake in *Buckley*: the restoration and preservation of citizens’ faith in the democratic process. *See Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 521-22 (8th Cir. 1998). No less than the Congress, the Missouri legislature “was justified in concluding that the interest in safeguarding against the appearance of impropriety” required the elimination of unlimited contributions. *Buckley*, 424 U.S. at 30. *Buckley* leaves no room to question the constitutional validity of that effort.

² Although the *Buckley* Court did not attach a doctrinal label to the “rigorous” standard of review to which it subjected contribution limits, *Buckley*, 424 U.S. at 29, *amici* believe the Court applied intermediate scrutiny. In the view of *amici*, however, whether the *Buckley* level of review for the FECA contribution limits is more properly characterized as “intermediate” or “strict” scrutiny is beside the point, because the virtually identical Missouri limits survive the *Buckley* standard, whatever its label. Moreover, as *amici* discuss *infra* in Part II.A., this Court’s First Amendment jurisprudence since *Buckley* independently establishes that, because Missouri’s justification for its contribution limits is unrelated to the communicative impact of the speech, the limits should be analyzed under intermediate scrutiny.

The constitutionality of Missouri's \$1,075 limit on contributions to candidates for statewide office is assured not merely by the broad reasoning of *Buckley* but also by the precise holding in that case. The *Buckley* Court upheld FECA's \$1,000 limit on individual contributions to any candidate for federal office. See *Buckley*, 424 U.S. at 23-35. That limit persists in federal law to this day. 2 U.S.C. § 441a(a)(1)(A).³ If a \$1,000 limit is constitutional, then a \$1,075 limit must be constitutional. Moreover, the higher cost of campaigns for federal office ensures that a contribution of any given amount will have a greater impact in most state elections than in most federal elections.⁴ Thus, the impact on expressive freedom of the contribution limits at issue in this case likely will be even less than that of the limits upheld in *Buckley*.

Nor do the effects of inflation warrant departure from *Buckley*. The author of the Eighth Circuit's opinion argued that

³The federal contribution limit applies to "any candidate . . . with respect to any election for Federal office," 2 U.S.C. § 441a(a)(1)(A) -- the Presidency, Vice Presidency, Senate, and House. The Missouri \$1,075 limit applies to candidates for governor, lieutenant governor, secretary of state, state treasurer, and state auditor. Mo. Rev. Stat. § 130.032 (Supp. 1997).

⁴Expenditures in recent elections demonstrate that statewide candidates for federal offices in Missouri spent far more than statewide candidates for Missouri offices. In 1994, the State's two major-party candidates for United States Senate spent a total of \$7.57 million in the general election campaign. See Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1998*, at 826-27 (1997). In the 1992 Senate race, the candidates spent \$6.16 million. *Id.* In contrast, the two major-party candidates for governor in 1996 spent the considerable but significantly smaller sum of \$3.35 million in the general election. Will Sentell, *Governor Bid Cost Kelly, Carnahan \$3.4 Million*, Kansas City Star, Dec. 6, 1996, at C3. The cost of the 1992 gubernatorial race was \$4.3 million. *Id.* Lower-level statewide races cost even less. In 1996, for example, the two major-party candidates for lieutenant governor spent \$2.3 million, while the two candidates for state treasurer spent \$370,000. *Id.*

price inflation since the 1976 *Buckley* decision justified striking down the Missouri contribution limit. See *Shrink Missouri*, 161 F.3d at 522-23. That argument did not even persuade the concurring judge below, see *id.* at 523 (Ross, J., concurring), and nothing in *Buckley* or this Court's subsequent decisions supports it. In fact, the *Buckley* Court anticipated the judicial urge to calibrate the amounts of contribution limits when it rejected the argument that Congress in FECA should have set different limits for presidential, Senate, and House campaigns because of their varying costs. "Congress' failure to engage in such fine tuning does not invalidate the legislation. . . . [A] court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000." *Buckley*, 424 U.S. at 30 (internal quotation marks and citation omitted); see also *id.* at 242 (Burger, C.J., concurring in part and dissenting in part) (raising inflation argument against Court's holding). Rather, the Court set a high standard for any judicial action directed at the specific level of a contribution limit: "Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30.

A \$1,075 contribution limit for statewide office in 1998 does not differ in kind from a \$1,000 contribution limit for federal office in 1976. Based on the two decisions cited in *Buckley*, legal restrictions "differ in kind" only if one of them completely denies some constitutional entitlement that the other leaves intact. See *Buckley*, 424 U.S. at 30 (citing *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Rosario v. Rockefeller*, 410 U.S. 752 (1973)). *Rosario* upheld a New York requirement that voters register their party affiliations eleven months in advance of primary elections as a condition on participation. *Kusper* struck down an Illinois statute that required party commitments 23 months in advance of primaries. The *Kusper* Court distinguished *Rosario* on the ground that the New York law did not prevent any voter from choosing to participate in any

party's primary in a given year. In contrast, the Illinois law "locked in" a voter's party preference more than one year before the primary, thereby barring anyone who had voted in one party's primary from choosing to vote in some other party's primary the following year. See *Kusper*, 414 U.S. at 60-61. This complete denial of the right to vote in a particular primary was the *Buckley* Court's example of a "difference in kind." No such difference exists here. The level of Missouri's contribution limits, as with the limit in *Buckley*, still allows a contributor to make "a general expression of support for [a] candidate and his views." *Buckley*, 424 U.S. at 21; see also *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 615 (1996) ("the symbolic communicative value of a contribution bears little relation to its size") (plurality opinion). *Buckley* made clear that such limits do not preclude "the potential for robust and effective discussion of candidates and campaign issues." *Buckley*, 424 U.S. at 28-29. Thus, the effects of inflation have not created a difference in kind.

This Court in *Buckley* properly upheld the prerogative of legislatures to protect the integrity and viability of our democratic institutions by restricting campaign contributions. Based on their experiences, *amici* submit that the dominance of money in politics has sparked a crisis in American democracy; without the modest limits legislatures have placed on contributions, that crisis would be deepened. The Eighth Circuit's decision in this case represents a frontal assault on this Court's judgment and on the ability of legislatures to provide at least some check on the forces of cynicism and malaise that threaten to destroy Americans' faith in politics and government. This Court should reaffirm and fortify *Buckley*'s vindication of contribution limits.

II. THIS COURT'S CAMPAIGN FINANCE JURISPRUDENCE SHOULD NOT STIFLE THE ABILITY OF LEGISLATURES TO ENACT - NECESSARY REFORMS.

Although this Court can and should uphold Missouri's contribution limits on the basis of *Buckley* alone, the Court should make clear in so doing that legislatures have leeway to enact campaign finance reforms in general. The Court should not leave the majoritarian branches of government in a straitjacket, preventing enactment and enforcement of campaign finance reforms needed to restore and maintain Americans' faith in "the integrity of [the] electoral process," an attribute "basic to a democratic society." *United States v. International Union, United Automobile Workers*, 352 U.S. 567, 570 (1957). Rather, practical experience since *Buckley*, as well as the Court's own precedent, support application of a lenient standard of review and the provision of substantial deference to legislative judgment. Specifically, as demonstrated below, this Court should make clear that intermediate scrutiny applies to contribution limits and to all campaign reforms that are not aimed at the communicative impact of speech, and it should recognize the institutional competence uniquely possessed by legislatures both to identify threats to the electoral system and to implement corresponding reforms.

A. Intermediate Scrutiny Should Apply to Campaign Finance Reforms Not Aimed at the Communicative Impact of Speech.

This Court's jurisprudence since *Buckley* has made clear that "[t]he government's *purpose* is the *controlling* consideration" in determining the standard of review for regulations challenged on First Amendment grounds. *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies only to "regulations enacted for the purpose of restraining speech on

the basis of its content.” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). The more lenient requirements of intermediate scrutiny apply “to those cases in which the governmental interest is unrelated to the suppression of free expression,” *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quotation omitted), or where the legislation is “justified without reference to the content of the regulated speech.” *Renton*, 475 U.S. at 48 (quotation omitted); see also *Ward*, 491 U.S. at 791. This is true even if the regulation has “an incidental effect on some speakers or messages but not on others.” *Ward*, 491 U.S. at 791. Indeed, intermediate scrutiny is appropriate for laws that may directly regulate speech activity, as long as the government’s justification for doing so is unrelated to the content of the expression limited by the regulation. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) (“*Turner II*”).⁵

Because the appropriate standard of review depends on the government’s “overriding objective” in passing the challenged regulation, see *Turner I*, 512 U.S. at 646, not all campaign finance regulations should be subjected to strict scrutiny. Rather, such regulations should be subjected to strict scrutiny only if they are imposed for the purpose of regulating the communicative impact of speech. This conclusion is consistent with *Buckley*. That case applied strict scrutiny to the expenditure limits at issue because those limits were justified on

⁵ The mere fact that campaign finance regulations only address regulations related to campaign financing does not mean such regulations are aimed at the communicative impact of speech. In *Renton*, for example, this Court declined to apply strict scrutiny to a zoning restriction that directly burdened expression of a particular content -- “adult” films -- because the government’s “predominant concerns” in preventing “secondary effects” were unrelated to suppression of the regulated speech. *Renton*, 475 U.S. at 47 (internal quotation marks omitted).

the basis of the communicative value of the speech. As this Court explained in *Turner I*, “[t]he Government [in *Buckley*] justified the law as a means of ‘equalizing the relative ability of individuals and groups to influence the outcome of elections.’ . . . Because the expenditure limit in *Buckley* was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech.” *Turner I*, 512 U.S. at 657-58 (quoting *Buckley*, 424 U.S. at 48).⁶ Accordingly, to determine the appropriate standard of review, a court must consider whether the justification offered by the government relates to the communicative impact of the speech.

A number of purposes that are unrelated to the communicative impact of speech motivate campaign finance regulations. First and foremost, regulating campaign finance increases citizens’ faith and confidence in the political system. Efforts to restore faith in our representative government are unrelated to “the ideas or views expressed” by campaign contributions. *Turner I*, 512 U.S. at 643. Recent reform efforts in a number of states, including Missouri, indicate continued dissatisfaction with the current system of campaign financing.⁷

⁶ To be sure, the *Buckley* Court rejected an argument, premised on *United States v. O’Brien*, 391 U.S. 367 (1968), that regulation of contributions and expenditures was regulation of conduct, not speech. *Buckley*, 424 U.S. at 16-17. But that is hardly dispositive of *amici*’s argument in favor of intermediate scrutiny. It has been clear at least since *Ward* that it is the government’s justification that is controlling. *Ward*, 491 U.S. at 791.

⁷ See <<http://www.publiccampaign.org/statemap.html>> (visited Apr. 7, 1999) (indicating that, as of February 1999, public financing bills had been or probably would be introduced in 16 state legislatures, such proposals may be the subject of voter initiatives in four states in the year 2000, coalitions in 24 other states were pursuing reform, and four states -- Maine, Vermont, Arizona, and Massachusetts -- already have passed such reform by initiative or legislative action); *State Capitols Report* (Sept. 26, 1997) (listing status of

As recognized in *Buckley*, avoiding corruption or the appearance of corruption is necessary to serve this broader purpose; indeed, it is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (quoting *Letter Carriers*, 413 U.S. at 565).

Reforms also can be justified by the related need to address voter apathy. Studies have shown a correlation between the decrease in voter turnout and the increase in campaign spending. E. Joshua Rosenkranz, *Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 17 (1998). Voter apathy, and alienation from the government in general, is exacerbated by public perception that elected officials are more responsive to those who contribute to their campaigns than to those who do not. One study in Minnesota revealed that "almost one-third of those surveyed were less likely to vote or participate in politics because they believed that givers have more influence over elected officials than [non-givers] do." David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 86, 122 (Winter 1999). This Court has recognized that the government has a compelling interest in addressing this public disdain for the electoral process, in order "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *Automobile Workers*, 352 U.S. at 575.

In addition, certain campaign finance reforms can be justified by the need to reduce the amount of time elected officials must spend amassing campaign "war chests." This justification in no way depends upon the communicative impact

reform proposals in all 50 states).

of any expression that might be curtailed as a result of such a regulation, and it is not based in any way on government hostility to the messages expressed by candidates. Rather, such limits seek to ameliorate harmful effects that occur when office-holders and candidates must devote enormous amounts of their time to solicitation of contributions. That this burden exists and has come to dominate the professional lives of office-holders and candidates is not open to serious question.⁸ For example, in announcing earlier this year that he will not run for re-election in November 2000, Senator Frank Lautenberg noted that a "powerful factor" in his decision was "the searing reality that I would have to spend half of every day between now and the next election fundraising."⁹ The incessant demands of fundraising hinder the ability of elected representatives to fulfill their public duties, and those demands divert candidates' time from discussing their positions on the issues to raising funds. In the words of former Representative Vin Weber, "[T]he amount of time people have to put into raising money is a serious problem in the country. . . . There's no way you can prove its impact on the quality of the Congress's work But when the members making decisions can't devote serious quality time to serious decisions, it has to [result in] a lower quality of work."¹⁰ In addition, the necessity of amassing a huge campaign "war chest" creates a strong disincentive to run for

⁸ See generally Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281, 1281-82 & nn.1-3 (1994).

⁹ Rachel Van Dongen & John Bresnahan, *Lautenberg Decides to Call It Quits in 2000, House Members, Whitman, in Mix For Open Seat*, Roll Call, Feb. 18, 1999.

¹⁰ *Speaking Freely*, Center for Responsive Politics <<http://www.crp.org/pubs/speaking/speaking03.html>> (visited Apr. 7, 1999) (alterations in original).

office, for both incumbents and challengers. This burden would exist even if contributions were not limited; the "arms race" would simply involve greater dollar amounts.

Each of these justifications for reform addresses a public concern wholly unrelated to the communicative impact of campaign speech. As to preserving public confidence in the system and combating voter apathy, the problem is not the political message funded by a large contribution or expenditure, but rather the perceived significance of the very fact that a large amount of money is donated or spent. *Cf. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (upholding restrictions on federal employees' political activities justified in part on ensuring that "[public] confidence in the system of representative Government is not . . . eroded to a disastrous extent"). As to limiting the time candidates spend raising money, the problem is not the message any candidate seeks to fund, but rather the extent to which the fundraising process itself hampers the job performance of public servants. *Cf. Renton*, 475 U.S. at 47 (reviewing zoning restriction on "adult" theatres under intermediate scrutiny because the restriction was meant to control "the secondary effects of such theatres on the surrounding community"). As in other instances of nonspeech regulations with ancillary effects on expressive freedom, *e.g., Turner I, supra*, intermediate scrutiny should apply to campaign finance reforms that address problems unrelated to the content of political speech.

In this case, however, the Eighth Circuit rigidly applied strict scrutiny to the contribution limits at issue without considering whether the limits were justified by reasons unrelated to the communicative value of the speech at issue. *Shrink Missouri*, 161 F.3d at 521. This was error. The Eighth Circuit's approach ignores that, in First Amendment cases, this Court has carefully avoided "imposing judicial formulas so rigid

that they become a straitjacket that disables government from responding to serious problems." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996). The principal purpose of Missouri's statute was to preserve the integrity of the State's electoral process. *Shrink Missouri Government PAC v. Adams*, 5 F. Supp. 2d 734, 738 (E.D. Mo. 1998). The legislature heard testimony on, and discussed, "the potential for buying influence." *Id.* (citation omitted). The state senator who co-chaired the legislature's committee on campaign finance reform believed that the limits were necessary because contributions in excess of the limits would "have the appearance of buying votes as well as the real potential to buy votes." *Id.* (citation omitted). This objective of preserving the integrity of the electoral process is wholly unrelated to the communicative impact of the regulated contributions. Intermediate scrutiny is accordingly the appropriate level of review.

B. Substantial Deference Should Be Given to Legislatures to Address the Significant Public Interests Implicated by Campaign Financing.

Answering the question of which standard of review to apply does not dictate the standard of proof that should be required of legislatures to withstand that review. *See Burson*, 504 U.S. at 198, 208-09 (applying strict scrutiny but giving substantial deference to legislative determination). Not only should the Court apply a lenient standard of review, it also should apply a deferential standard of proof that will allow vindication of legislative judgments that campaign finance reforms are necessary. This is particularly essential given that the governmental interest at stake -- the viability of our representative branches of government -- is one of constitutional magnitude.

This Court has long recognized both the compelling nature of the interest at stake and the legislature's power to address it. "[A] government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly" must necessarily possess "the power to protect the elections on which its existence depends from violence and corruption." *Ex Parte Yarbrough*, 110 U.S. 651, 657-58 (1884). Not only has the Court recognized the legislature's power to protect its very existence, but it has deferred to the legislature's predictive judgments as to the best way to do so. The "choice of means" to protect the integrity of elections "presents a question primarily addressed to the judgment of Congress." *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (upholding the Federal Corrupt Practices Act of 1925); see also *Letter Carriers*, 413 U.S. at 566. Therefore, if "the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs*, 290 U.S. at 547-48.

This deference has been applied to campaign reforms even in the face of First Amendment challenges when, as here, significant competing government interests are at stake. For example, in *Burson*, the Court did not require stringent proof from the legislature to uphold a 100-foot boundary around polling places. *Burson*, 504 U.S. at 209. As *Burson* noted, "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Id.* at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)) (alteration in original). There, the Court affirmed a campaign reform, even in the face

of strict scrutiny, on the basis of "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211.

This deference is provided in part because "it is difficult to isolate the exact effect" of campaign reforms on the harms they are designed to address. *Id.* at 208. Deference is especially important where, as with many campaign finance reforms, the justification for regulation is declining public faith in the electoral system -- a problem that is inherently difficult to prove by direct evidence and that legislators are distinctly well-positioned to assess. Moreover, the Court has recognized that it should not require that "a State's political system sustain some level of damage before the legislature could take corrective action." *Munro*, 479 U.S. at 195. The Court therefore has provided deference to permit legislatures "to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96.

Accordingly, the *Buckley* Court went out of its way to defer broadly to legislative judgments about the need for contribution limits. The Court upheld the FECA contribution limits based not on anything Congress actually proved but merely because "Congress could legitimately conclude that the avoidance of the appearance of improper influence" justified restrictions on contributions. *Buckley*, 424 U.S. at 27. As to the threat of actual corruption, the *Buckley* Court relied on common sense in acknowledging the importance of fundraising to elections and the danger that donors might exchange campaign funds for political favors. *Id.* at 26-27. The Court did not demand actual evidence of corruption, noting only that examples cited by the Court of Appeals showed that "the problem was not an illusory one." *Id.* at 27. Indeed, the Court declared that "the scope of such pernicious practices *can never*

be reliably ascertained.” *Id.* (emphasis added). Finally, *Buckley* admonished courts to avoid “fine tuning” of legislative limits on contributions. *Id.* at 30. The Court has reiterated this deferential portion of *Buckley* in subsequent cases. See *FEC v. National Right To Work Comm.*, 459 U.S. 197, 209-10 (1982) (finding that congressional judgment about electoral laws “warrants considerable deference”); *id.* (Court will not “second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared”); *California Medical Ass’n v. FEC*, 453 U.S. 182, 199 (1981) (holding that contribution limit was “an appropriate means by which Congress could seek” to advance governmental interest).

The deference that the Court afforded Congress on contribution limits was appropriate, and the Missouri legislature should be afforded the same deference here. The appropriateness of this deference is borne out by practical experience since *Buckley* with respect to issues on which the *Buckley* Court departed from this deferential tradition. For example, the *Buckley* Court substituted its own judgment for that of Congress with respect to expenditure limits, concluding that independent expenditures did not “presently appear to pose dangers of real or apparent corruption.” *Buckley*, 424 U.S. at 46. In so doing, the Court rejected the legislative judgment that the regulation of independent expenditures was necessary to prevent would-be contributors from circumventing contribution limits. *Id.* at 46-47.¹¹ The *Buckley* Court also substituted its

¹¹ Congress recognized at least as early as 1945 that the failure to limit expenditures creates a means to circumvent contribution limits. See *Automobile Workers*, 352 U.S. at 581-82 (“Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?”) (quoting 1945 Report of the House Special Committee to Investigate Campaign Expenditures, H.R. Rep. No. 79-2739 at 40).

own judgment for that of the legislature about the potential corruptive aspects of independent expenditures. *Id.* at 47. Only after substituting its judgment on these matters for the judgment of experienced participants in the political process was the Court able to conclude that there was an insufficient governmental interest in stemming corruption, or the appearance thereof, from unlimited expenditures. *Id.* at 47-48.

Practical experience since *Buckley*, however, has vindicated the legislative judgments that the *Buckley* Court disdained on these issues. Contrary to the *Buckley* Court’s prediction, the first-hand experience of *amici* indicates that the campaign regulations upheld in *Buckley* are insufficient, by themselves, to stop the decline of voter confidence in the integrity of the electoral process. See generally Schultz, *supra*, 18 Rev. Litig. at 113-19.¹²

Amici’s assessment is supported by empirical evidence. The public’s loss of faith in the system is most apparent in citizens’ failure to participate in the democratic process. The 1996 presidential election, with its explosion in “soft money” attack advertising, attracted only 49 percent of registered voters, the lowest total in 70 years. Rosenkranz, *supra*, at 17. Our woeful level of electoral participation -- the lowest in the democratic world, *id.* -- can be traced in large part to “the problem of perceived influence” by large campaign contributors

¹² See also, e.g., Anthony Corrado, *Party Soft Money: Introduction*, in *Campaign Finance Reform: A Sourcebook* 171-73 (A. Corrado et al. eds., 1997) (describing rise of soft money as a means of circumventing FECA contribution limits); Rosenkranz, *supra*, at 94; *Soft Money: A Look at the Loopholes* <<http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro4.htm>> (visited Mar. 25, 1999) (“Essentially, soft money blew a hole through the reforms of the 1970s. By any reasonable interpretation, the [1996] campaigns no longer adhered to contribution or spending limits.”).

over elected officials.¹³ In 1964, 29 percent of Americans believed that the government was “pretty much run by a few big interests looking out for themselves” and not “for the benefit of all people.”¹⁴ By 1992, that number had ballooned to 76 percent.¹⁵ Numerous opinion surveys confirm that Americans believe elected officials serve wealthy donors and not ordinary citizens. For example, a 1997 *New York Times*-CBS poll found that 75 percent of the public believes “many public officials make or change policy decisions as a result of money they receive from major contributors.”¹⁶ More bluntly, 71 percent of respondents in a 1994 Gallup Poll agreed with the statement: “Our present system of government is democratic in name only. In fact special interests run things.”¹⁷

¹³ Robert C. Sahr, *Campaign Finance Reform: The Issue in Brief*, Project Vote Smart <<http://www.vote-smart.org/issues/1998rsb/campfin.html>> (visited Mar. 13, 1999).

¹⁴ Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 Cal. L. Rev. 1, 3 & n.4 (1996) (citing University of Michigan Center for Political Studies, American National Election Studies 1952-1990).

¹⁵ *Id.* at 3 & n.3.

¹⁶ Francis X. Clines, *Most Doubt a Resolve to Change Campaign Financing, Poll Finds*, *New York Times*, Apr. 8, 1997, at A1.

¹⁷ <<http://www.commoncause.org/states/connecticut/polls.htm>> (visited Mar. 31, 1999). Numerous polls have produced variations on the same theme. In a 1994 Bannon Research study of registered voters in five states, 83 percent expressed the view that “politicians pay more attention to monied special interests than people.” *Id.* A 1995 Mellman Group/Public Opinion Strategies poll found that 68 percent of respondents “worried . . . a great deal” that “large campaign contributors get special favors from politicians.” *Id.* Similarly, a 1997 CNN-USA *Today*-Gallup poll found that 53 percent of the public believed campaign contributions influenced policy choices “a great deal,” while only 11 percent believed the effect was “not much” or “not at all.” <<http://www.publiccampaign.org/pollsumm.html>> (visited March 25, 1999).

This experience, which indicates that the campaign regulations upheld in *Buckley* are insufficient to stem the public’s declining loss of faith in the democratic process, differs markedly from the Court’s predictive judgments in *Buckley* and vindicates Justice White’s separate opinion. Justice White admonished the Court for its willingness to “claim[] more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed [the campaign finance bill] and the President who signed it.” *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). As it did with contribution limits in *Buckley*, this Court should provide substantial deference to legislatures to enact all campaign finance reforms. Legislatures, not courts, are institutionally better suited to assess the need for campaign finance regulations and what types of regulations will best address the declining faith of their constituents in the political process. And, as seasoned participants in that process, legislators have practical experience as to the potentially negative aspects of the campaign financing system and the best way to ameliorate them. As Justices Stevens and Ginsburg recognized in *Colorado Republican*, “Congress surely has both wisdom and experience in these matters that is far superior to ours.” 518 U.S. at 650 (Stevens, J., dissenting). This experience warrants “accord[ing] special deference to its

A 1997 Center for Responsive Politics survey found that two thirds of respondents believed the influence of contributions on elections and government policy was a major problem and that their own representatives would listen to the view of a large contributor before that of a constituent; 71 percent believed the high cost of campaigns was discouraging good people from seeking public office. <<http://www.crp.org/pubs/survey/s2.htm>> (visited Mar. 25, 1999). A study of voters in Minnesota indicated that 88 percent of those surveyed believed that elected officials were more likely to respond to individuals and organizations that contributed to their campaigns than to those who did not. See Schultz, *supra*, 18 Rev. Litig. at 121.

judgments.” *Id.* The Court must allow vindication of the predictive judgments of legislatures, such as the Missouri legislature here, that reforms are needed to address compelling government interests, interests that are themselves of constitutional magnitude.

Contrary to the Eighth Circuit’s suggestion, *see Shrink Missouri*, 161 F.3d at 522 n.3, this principle of deference is supported rather than undermined by this Court’s decision in *Turner I*. That decision reaffirmed that “courts must accord substantial deference to the predictive judgments of Congress.” *Turner I*, 512 U.S. at 665 (plurality opinion). This is true even when regulations are challenged on First Amendment grounds. *See id.* (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103 (1973)). Although the *Turner I* plurality noted that according deference did not foreclose judicial review, that review did not give the Court “license to reweigh the evidence *de novo*, or to replace Congress’ factual predictions with our own.” *Id.* at 666. That, in essence, is what the Eighth Circuit did here. The record evidence Missouri presented regarding the need for contribution limits was no less strong than the evidence about contribution limits before this Court in *Buckley*. *See* 424 U.S. at 26-27, 30. Missouri certainly did more than simply “posit the existence of the disease to be cured.” *Turner I*, 512 U.S. at 664 (citation omitted); *cf. Colorado Republican*, 518 U.S. at 618 (plurality opinion) (noting that the government did not point to any record evidence of legislative findings). The fact that a plurality of this Court in *Turner I* held that the government presented insufficient evidence to support its regulations in that factually dissimilar case, *see Turner I*, 512 U.S. at 667 (plurality opinion), does not support the Eighth Circuit’s decision here.

The Eighth Circuit’s reliance upon *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995)

(“*NTEU*”), is similarly unavailing. This Court in *NTEU* expressly acknowledged “our obligation to defer to considered congressional judgments about matters such as appearances of impropriety,” *id.* at 476, but simply found the government’s evidence in that case too flimsy to trigger that obligation. That is because the honoraria ban at issue in *NTEU* -- which barred even nonpolicymaking federal employees, *see id.* at 472-73 & n.18, from receiving compensation for expressive activity that had nothing to do with their work, *see id.* at 474 -- addressed a threat of harm that was “‘a hypothetical possibility and nothing more.’” *Id.* at 475 n.21 (quoting *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985)).¹⁸ In contrast, as the experience of *amici* and empirical evidence demonstrate, campaign finance regulations, such as the contribution limits at issue here, address much more than a “hypothetical” threat. Accordingly, the Eighth Circuit’s requirement that the legislature present “some demonstrable evidence” of “genuine problems,” *Shrink Missouri*, 161 F.3d at 521-22, is inconsistent with this Court’s precedent, and it fails to accord sufficient deference to the legislature’s assessment of the public’s concerns with campaign financing and the best way to ameliorate those concerns. As this Court has recognized, legislatures should not have to wait until our representative system of government has sustained damage to pass reforms to protect it. *Burson*, 504 U.S. at 209 (quoting *Munro*, 479 U.S. at 195-96).

Nor should this Court refuse to accord proper deference to legislative judgments about campaign finance reform because of

¹⁸Indeed, the Court questioned whether Congress ever had contemplated the rationale advanced by the government for the challenged regulation, *see NTEU*, 513 U.S. at 473, and it noted that the government relied primarily on an “administrative convenience” justification that effectively denied the need for any congressional judgment. *See id.* at 474.

concerns that such reforms might favor incumbents over challengers. Campaign regulations apply to every candidate -- whether Democrat or Republican, incumbent or challenger. Such evenhanded restrictions are entitled to deference unless there is evidence of "invidious discrimination against challengers as a class." *Buckley*, 424 U.S. at 31. In fact, as the Court acknowledged in *Buckley*, certain reforms, including contribution limits, generally will negatively affect incumbents more than challengers. *Id.* at 32.

Moreover, the proven inaccuracy of the *Buckley* Court's substituted judgment about the electoral process demonstrates that refusing to defer to legislative judgments is unwise. Indeed, the Court's unfamiliarity with the campaign financing system has led it to overestimate the effect that regulations have on First Amendment interests. Even though the purpose of a reform is unrelated to the communicative impact of speech, the effect can be to enhance, rather than to restrict, the interests protected by the First Amendment. "It is quite wrong to assume that the net effect of limits on contributions and expenditures -- which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials -- will be adverse to the interest in informed debate protected by the First Amendment." *Colorado Republican*, 518 U.S. at 649-50 (Stevens, J., dissenting).

Congress comprises the elected representatives of the sovereign People. U.S. Const. art. I. Public opinion surveys consistently show that Americans want meaningful campaign

finance reform.¹⁹ Refusing to accord proper deference to the legislature in this most political of arenas will overprotect against a risk that legislators will subvert the public good, while denying the People's authority to conduct the political process as they see fit.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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April 12, 1999

¹⁹ A 1997 survey found strong consensus for a wide range of finance reform proposals, including limiting "soft money" contributions to political parties (favored by 75 percent of respondents), limiting a candidate's ability to spend personal wealth on a campaign (70 percent), requiring congressional candidates to raise a certain percentage of their campaign funds in their own states (85 percent), and limiting or banning PAC contributions (61 percent). <<http://www.crp.org/pubs/survey/s2.htm>> (visited Mar. 25, 1999), Princeton survey. Similarly, a 1996 Gallup poll found that 79 percent of respondents favored expenditure limits for congressional candidates. <<http://www.publiccampaign.org/pollsumm.html>> (visited Mar. 25, 1999), *Public Campaign: The Power of Public Opinion*. A variety of polls conducted in 1996 and 1997 also reported that substantial majorities favored various proposals for public financing of federal campaigns. See *id.* (summarizing poll results).

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON, Attorney General of Missouri; RICHARD ADAMS, PATRICIA FLOOD, ROBERT GARDNER, DONALD GANN, MICHAEL GREENWELL and ELAINE SPIELBUSCH, members of the Missouri Ethics Commission; and ROBERT P. MCCULLOCH, St. Louis County Prosecuting Attorney,

Petitioners,

—v.—

SHRINK MISSOURI GOVERNMENT PAC and ZEV DAVID FREDMAN,

—and—

JOAN BRAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF AMICI CURIAE PAUL ALLEN BECK,
THAD BEYLE, JANET M. BOX-STEFFENSMEIER, LEON D.
EPSTEIN, DONALD P. GREEN, RUTH S. JONES, IRA
KATZNELSON, JONATHAN S. KRASNO, DAVID B.
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INTEREST OF THE AMICI CURIAE

Amici are political scientists, many of whom have experience in, and all of whom are students of, the political process. *Amici* submit this brief *amicus curiae* in support of Petitioners with the consent of the parties.¹ *Amici* have dedicated all or a substantial part of their careers to studying, analyzing and discussing the history of and trends in the political system in the United States. As a result, *amici* have considerable knowledge of campaign financing practices and the effects of various practices on the electoral process. Furthermore, the *amici* are all well informed about the multitude of other factors that also affect campaigns and elections. *Amici* thus have reasoned opinions on the issues in this case and all share an interest in bringing their views before this Court.

In particular, the *amici* are: Paul Allen Beck, Professor, Ohio State University, former Program Chair of the American Political Science Association, whose writings include *Party Politics in America* (8th ed. 1997); Thad Beyle, Thomas C. Pearsall Professor of Political Science, University of North Carolina at Chapel Hill, former Chairman of the Board of the North Carolina Institute of Political Leadership, whose writings include *Governors and Hard Times* (1992); Janet M. Box-Steffensmeier, Associate Professor, Ohio State University, whose writings include *A Dynamic Model of Campaign Spending in Congressional Elections*, 6 *Pol. Analysis* 37 (1997) (co-authored with Tse-Min Lin); Leon D. Epstein, Hilldale Professor of Political Science Emeritus, University of Wisconsin-Madison, former President of the American Political Science Association, whose writings include *Polit-*

¹ The parties have consented to the submission of this brief. Their letters are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was not authored in whole or in part by counsel for any of the parties. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae* and their counsel.

ical Parties in the American Mold (1986); Donald P. Green, Professor of Political Science and Director of the Institution for Social and Policy Studies, Yale University, whose writings include *The Dynamics of Campaign Spending in US House Elections*, 56 J. Pol. 459 (1994) (co-authored with Jonathan S. Krasno and Jonathan A. Cowden); Ruth S. Jones, Professor, Arizona State University, whose writings include *A Decade of U.S. State-Level Campaign Finance Reform*, in *Comparative Political Finance Among the Democracies* 57 (Herbert E. Alexander & Rei Shiratori eds., 1994); Ira Katznelson, Ruggles Professor of Political Science and History, Columbia University, whose writings include *The Politics of Power: A Critical Introduction to American Government* (rev. 3d ed. 1987) (co-authored with Mark Kesselman); Jonathan S. Krasno, Senior Policy Analyst, Brennan Center for Justice at New York University School of Law, whose writings include *Challengers, Competition, and Re-Election: Comparing Senate and House Elections* (1994); David B. Magleby, Distinguished Professor and Chair, Department of Political Science, Brigham Young University, whose writings include *The Money Chase: Congressional Campaign Finance and Proposals for Reform* (1990) (co-authored with Candice J. Nelson); Michael J. Malbin, Professor of Political Science, State University of New York at Albany, whose writings include *The Day After Reform: Sobering Campaign Finance Lessons from the American States* (1998) (co-authored with Thomas L. Gais); Thomas E. Mann, Director, The Brookings Institution, whose writings include *Campaign Finance Reform: A Sourcebook* (1997) (co-edited with A. Corrado, D. Ortiz, T. Potter and Frank J. Sorauf); Burke Marshall, Nicholas D. Katzenbach Professor Emeritus of Law and George Crawford Professorial Lecturer in Law, Yale Law School, and member of the Board of Editors of *Political Science Quarterly*; Frank J. Sorauf, Regents' Professor Emeritus of Political Science, University of Minnesota, former President of the Midwest Political Science Association, whose writings include *Inside Campaign Finance: Myths and Realities* (1992); and Raymond

E. Wolfinger, Heller Professor of Political Science, University of California, Berkeley, whose writings include *The Myth of the Independent Voter* (1992) (co-authored with Bruce E. Keith, David B. Magleby, Candice J. Nelson, Elizabeth Orr and Mark C. Westlye).

PRELIMINARY STATEMENT

Rules of ethics are built not only on sanctioning actual impropriety but also on avoiding the appearance of impropriety so as to enhance public confidence in the regulated process or profession. Rules of ethics, and in large part this is what limits on campaign contributions are under *Buckley v. Valeo*, 424 U.S. 1 (1976), are drawn by a judgmental balancing of those conditions that tend to preserve public confidence against those conditions that allow for the proper functioning of the process or profession in question. As professional political scientists, we value both ethical standards and the ability of candidates to function within them.

We argue below that when fixing rules of ethics for candidates for public office and for the electoral process, state legislatures should be granted latitude to strike the balance within a range of reason. Because there is good reason to grant some flexibility to state legislatures when it comes to fixing contribution limits, this Court need not become a Universal Ethics Review Commission.

Next we analyze publicly available data from U.S. Senatorial races, which indicate that Missouri's contribution limits are high enough to allow for robust campaigns, including particularly a robust challenge to an incumbent. Finally, we urge that when reviewing ethical rules for campaign finance, actual practices in the real world of political fundraising must be taken into account and that these practices provide further support for the reasonableness of the limits at issue here.

One key point needs emphasis. This brief should not be taken as reflecting agreement with the specific limits the Mis-

souri Legislature fixed under the statute at issue in this case. Were we testifying before a legislative body, some of us might favor limits that are higher and others of us might favor limits that are lower. What we all agree on is that the Legislature needs to be able to operate within a range of reason and that the Missouri Legislature in this instance fixed limits that fall within that range.

POINT I

THE LEGISLATURE SHOULD HAVE LATITUDE TO FIX CONTRIBUTION LIMITS WITHIN A RANGE OF REASON

We are confident that other briefs filed in this case will provide this Court with a full discussion of the legal analysis to be applied under the First Amendment to contribution limits fixed by a State Legislature. We expect they will urge that the *Buckley* decision did not apply strict scrutiny, did not insist on a narrowly tailored regulation and did not require application of the least restrictive means test in its review of the \$1,000 contribution limit at issue there. We are in general agreement with those views, but the purpose of this brief is not to offer a strictly legal analysis.

We rather offer this brief to aid this Court with a statement of the reasons why, in our judgment, State Legislatures should be granted considerable latitude when First Amendment review of contribution limits is undertaken by the judiciary.²

² Our discussion assumes a system of campaign financing largely dependent on nonpublic financing, including individual contributions. Although the issue is not presented here, this Court should not preclude itself by what it writes here from deciding in a case that does fairly present the issue whether a State Legislature may mandate that campaigns be financed entirely or nearly entirely with public funds and whether under such a regime the financing of campaigns through individual contributions or the candidate's own resources may be prohibited.

That latitude has two parts: latitude in deciding what level of contribution creates an appearance of impropriety and latitude in deciding whether the limit so constrains fundraising as to damage the responsiveness of the electoral process. We discuss each in turn.³

A. Latitude with Respect to the Appearance of Impropriety

How big a contribution creates an appearance of impropriety? This is a complex question because the question of the impact of contributions on governmental decision making is itself complex. Many factors influence the conduct of elected officials and their political appointees, and it is extremely difficult to reach general conclusions regarding the threshold at which campaign contributions create a widespread impression of undue influence. There is no doubt, however, that there is a strong populist component to the thinking of a significant part of the populace, and we think a State Legislature should be able if it chooses to take that thinking into account as it strives to increase public confidence in government. The median household income in the United States in 1996 was \$35,492, the income of 20.4% of all households fell below \$15,000 and the income of an additional 15.4% of all households fell below \$25,000. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1998*, at 468 tbl.738 (118th ed. 1998). Thus for many Americans \$500, let alone \$1,000, is a lot of money. If someone gave them \$1,000 to help them keep their job, or to get a new one, that would be an important event.

The viewpoint of the person receiving the contribution is important too. What will a candidate do to get a contribution of more than \$1,000, and how responsive to the contributor's concerns will the candidate feel he or she must be in order to

³ For the Court's general reference, Appendix B sets forth a bibliography of selected works from the academic literature concerning campaign finance and the electoral process.

expect a like contribution in the next election cycle? Further, we need to keep in mind that it is not merely a \$1,000 contribution at issue, but a \$1,000 primary election contribution, a \$1,000 general election contribution and often contributions in each race from two spouses.⁴ It can add up to \$4,000 for a single "ask."

Even limiting the analysis to \$1,000, and taking account of the complexity of the political process, we have no doubt that many voters believe, and reasonably believe, that a successful candidate will be reluctant not to return the phone call of a person who contributed more than \$1,000, particularly if that contributor was personally solicited by the candidate. A typical voter would likely think that a person contributing at some lesser level, or not contributing at all, is more likely to have the call returned by a staff person.

We urge that the likely prevalence and plausibility of the belief that substantial contributions, and certainly those of over \$1,000, bring access should be enough to support a legislative judgment that an appearance of impropriety exists. The ability to make an argument directly to an officeholder and to address on the spot the officeholder's concerns need not be outcome determinative to be materially influential. The legislature should have the latitude to conclude that this perception, and indeed reality, of improved access does enough to impair confidence in government that it should be reduced by barring contributions of over \$1,000.

Even if the perception and reality of improved access for the over-\$1,000 contributor were insufficient to create an appearance of impropriety, the perception and reality of bias in favor of the interests of the over-\$1,000 contributor would be sufficient to create such an appearance. Such bias could reasonably be perceived as potentially outcome determinative

⁴ We do not mean to suggest that one spouse can be assumed to speak for the other, but rather merely observe that many spouses approach political contributions together in a spirit of partnership.

when deciding whom to appoint or whom to sue or whose organization to favor with a grant or a contract or a favorable regulatory adjudication.

A State Legislature could also reasonably conclude that the bias in making an individual- or institution-specific governmental decision is not the only relevant kind of bias. Another source of bias that arises from contributions of over \$1,000 is the policy choice bias in weighing the interests of the class of people who can afford to make contributions of over \$1,000 and against the interests of the class of people who cannot afford to contribute even \$200. This kind of bias has a potential to influence such issues of key concern to the mass of voters as who benefits from tax reductions, what quality of education will be provided in middle and low income school districts and how the balance will be struck between competitiveness and job security. A State Legislature should have the flexibility, if it chooses, to consider the impact of this kind of bias on public confidence in government.

Not only should a State's political branches be permitted to take the foregoing issues into consideration, but the judiciary should recognize the political branches' greater institutional capacity for determining contribution limits that would reduce public perceptions of impropriety. The Eighth Circuit's decision below, if affirmed, must inevitably lead to close judicial scrutiny of the specific limits set by each State that chooses to adopt campaign finance reform legislation. Yet by what judicial calculus can a court distinguish between the impact on promoting public confidence in government of a \$1,000 limit and, for example, a \$5,000 limit?

The fact-finding methods available to legislators, both formal and informal, are more appropriate to the task. Legislators have close contact with the very people whose perceptions are at issue, namely constituents and contributors.

B. Latitude with Respect to Impact on Fundraising

How much money is needed to conduct a robust campaign? Again this is a complex question. For a statewide race it depends on the size of the state, the attentiveness of the voters, norms with respect to the availability of so-called "free" or "earned" media, whether one or more media markets straddle state lines and therefore involve media expenditures that are in part wasted on persons not entitled to vote, the extent to which media expenditures are wasted on unregistered voters, whether the vote turns itself out or requires heavy expenditures to get a good turnout of supporters, the norms with respect to negative ads which can be expensive to counteract, the availability of data to target direct mail, the norms with respect to volunteering to work for a campaign without pay, prevailing pay rates for political workers, whether there is a clubhouse structure, norms with respect to the use of phone banks, the role of unions, the role of independent issue advocacy and a number of other factors.

The effort to study this issue is also made more difficult by a chicken and egg problem. Is the campaign won because the candidate has more money or does the candidate have more money because he or she has the appeal to win the campaign?

There is one group of people who have deep personal knowledge of all these factors and of their impact on the cost of a robust campaign within the political jurisdiction in question. That group is the Legislators who make the laws for that jurisdiction and the Governor who signs them. A court could study the issue in depth, and after lengthy hearings and the testimony of competing experts, it could only hope to approach the expertise of the political insiders. Or it could spend an equal amount of time studying the legislative process to assure itself that a "hard look" had been taken at all the various relevant factors when the limits were set. Yet there would be little reason to draw comfort from this approach, since it is nearly impossible to be confident about

what calculus produces a particular legislative conclusion. The variables are countless.

Under either form of heightened judicial scrutiny, the litigation burden on the State to create and present a detailed record in support of a precise dollar figure would be considerable; the prospect alone could chill the enactment of campaign finance reform legislation. This Court might therefore consider whether in-depth judicial study under the adversary system of the costs of political campaigns is necessary to prevent an abridgment of the freedom of speech and political association guaranteed by the First Amendment? We respectfully submit that the answer is no.

First, the assessment of how much it takes to run a robust campaign is not an exact science, and a range of judgment inheres in the very process of analysis. Throughout this brief we have referred to a \$1,000 contribution limit and not the \$1,075 limit that is actually at issue. That is because it would be misleading to suggest that dollars and tens of dollars are of scientific significance. To the contrary, the impact on fundraising revenue of a particular change in a contribution limit is hard to pin down with any precision. The impact of local political culture on the cost of a campaign is also difficult to quantify with accuracy. These uncertainties suggest the need for a range of reason.

Also, Legislators and Governors have some motivations that work against setting too low a contribution limit. It has often been observed that, among the many advantages enjoyed by incumbents, they are in a better position than are challengers to raise larger contributions.⁵ This is because of

⁵ In 1998, U.S. Senate incumbents averaged \$1,481,861 in large contributions (\$750 to \$1,000) from individuals, whereas challengers did half as well, averaging \$654,667. The pattern was the same in the 1998 U.S. House of Representatives campaigns, with incumbents collecting \$123,266 in large donations and challengers collecting \$44,053. (Information compiled from downloadable databases prepared by the U.S. Federal Election Commission available at <<http://www.fec.gov/finance/finmenu.htm>>.)

the perception that they have the power to give a quicker and more certain return to the contributors who invest in them. The fundraising advantage of incumbents means that when an incumbent votes to reduce a contribution limit, he or she is almost certainly voting to give up more large contributions than his or her challengers.

We do not suggest that this circumstance means that no need exists for scrutiny under the First Amendment. Incumbents have many advantages in access to free media, and in other respects, and, if they secure the enactment of a contribution limit so low that it leaves most challengers without viable funding, they may be able to hinder the emergence of effective opposition. Moreover, Legislatures controlled by a single party might strive to reduce the opposing party's ability to raise and spend funds. However, such a strategy may be risky to many incumbents, because if the contribution limit gets low enough, it may open up a grassroots fundraising advantage to the challenger. Another and stronger disincentive to this strategy is the self-financed challenger. Here, the contribution limit cannot under the First Amendment apply to the large amount of personal resources the self-financed candidate may devote to the campaign. See *Buckley v. Valeo*, 424 U.S. 1, 51-54 (1976). Too low a limit will leave the incumbent vulnerable.

When deciding how much latitude to give to a State Legislature, we urge the Court to focus on the minimum amount that a quality challenger needs to mount a campaign that has a chance of success. As we discuss below, a quarter century of experience with a \$1,000 contribution limit under the Federal Election Campaign Act ("FECA") shows no ill effect on the success of challengers. It is important, in this regard, to keep in mind that to the extent the contribution limit restricts the supply of money, it does so for both the incumbent and the challenger. Accordingly the minimum amount is an amount needed to get basic exposure and not an amount needed for competitive exposure. A contribution limit that

makes it reasonably foreseeable that a challenger will be unable to raise that amount runs afoul of the First Amendment. Above that minimum, the range of judgment in balancing what is needed to secure public confidence and what is needed to insure the proper functioning of the system should rest with the legislative process.⁶

POINT II

FUNDRAISING DATA FROM U.S. SENATORIAL CAMPAIGNS CONFIRMS THE CONSTITUTIONALITY OF THE MISSOURI STATEWIDE LIMIT

We urge above that a campaign contribution limit runs afoul of the First Amendment when it makes it reasonably foreseeable that a challenger will be unable to raise enough to run a robust campaign. Respondents offered no evidence that Missouri's \$1,075 contribution limit runs afoul of this standard and accordingly their challenge should have been rejected out of hand. To the extent this Court considers the position adopted by one member of the panel in the decision below that inflation has gradually transformed a \$1,000 contribution limit into an unconstitutional "difference in kind," see *Shrink*

⁶ Although we focus in this brief on a \$1,000 contribution limit, and specifically Missouri's \$1,075 contribution limit for statewide races, the same principles would apply to smaller contribution limits, such as the \$525 and \$275 contribution limits enacted by Missouri with respect to Missouri's smaller, nonstatewide electoral districts. In smaller races, voters could reasonably believe that candidates may be willing to do more for a smaller contribution because the supply of potential contributors is smaller. The Legislature should have the latitude to take this perception into account when fixing limits to preserve public confidence in the electoral process. Likewise, the Legislature should have the latitude when establishing limits for smaller races to take into account factors, such as a smaller numbers of voters or the existence of fewer media markets, that may reduce the costs necessary to run a robust campaign. Accordingly, if this Court reviews Missouri's lower contribution limits in addition to the \$1,075 limit, we would urge the Court to reverse the judgment below in all aspects.

Missouri Government PAC v. Adams, 161 F.3d 519, 523 (8th Cir. 1998) (Bowman, C.J., opinion announcing the judgment of the court), we urge this Court that publicly available fundraising data for U.S. Senatorial campaigns do not support such a view and instead confirm that the risk that a \$1,000 contribution limit runs afoul of this standard, even in today's dollars, is remote.⁷

Appendix A sets forth by state the amount raised and spent by each of the major two party candidates in each of the U.S. Senate races in 1998, 1996, 1994 and 1992. A study of these tables shows the following about the ability of a challenger to conduct a robust campaign under a \$1,000 contribution limit.

First, challengers for election to the U.S. Senate have been able to raise substantial sums to finance their campaigns. As discussed above, identifying just what amount is necessary to mount a competitive campaign is a complex question, subject to numerous variables that differ from race to race and which by their nature defy precise quantification. But one indication that the \$1,000 contribution limit has not prevented chal-

⁷ Although we urge that inflation has not rendered challengers unable to compete under FECA's \$1,000 contribution limits, many of us do regard the Missouri Legislature's provision for periodic inflation-adjusted increases in the contribution limit at issue here as a much needed improvement over FECA. While many of us favor such provisions as a matter of legislative policy, we urge this Court that the inclusion or omission of automatic inflation-adjustment provisions in campaign finance legislation should not be a matter of constitutional analysis. A contribution limit that is presently necessary to restore public confidence and that permits challengers to run robust campaigns should not be constitutionally suspect based simply on concern that it may not anticipate future developments adequately. A court cannot be certain that the cost of campaigns will increase in accordance with general price inflation (however measured) or that the Legislature will not periodically amend the statute to adjust contribution limits in accordance with the best available information then known about the costs of campaigns or even to what extent candidates may become more or less dependent on individual contributions, depending on the future evolution of campaign finance legislation and fundraising practices.

lengers from raising sufficient funds to mount competitive campaigns is the fact that many challengers have raised amounts rivaling or exceeding the amounts raised by opposing incumbents.⁸ However much more money candidates might deem necessary to run the perfect campaign, the fact that challengers have been able to raise substantial sums on par with incumbents provides some comfort that the \$1,000 contribution limit has not placed challengers at a financial disadvantage.

This fact provides further comfort in light of available data showing that some candidates have been able to run winning campaigns despite being outspent by a substantial margin, as for example in 1996 when Joseph (Max) Cleland defeated Guy Millner in an open election for one of Georgia's Senate seats, even though he was outspent by more than 3 to 1 (\$9.9 million to \$2.9 million). See Appendix A, at 14a. As Cleland's campaign illustrates, the minimum amount necessary to run a competitive campaign is not necessarily an amount that equals that raised by the candidate's opponent, but rather may be a lower threshold amount that nonetheless provides a candidate the basic exposure necessary to present a viable challenge.⁹ Of course, not all challengers have raised significant

⁸ Examples from the 1998 Senate elections include races in California (challenger Matthew Fong raised \$10.8 million compared to incumbent Barbara Boxer's \$12.7 million), Georgia (challenger Michael Coles raised \$5.2 million compared to incumbent Paul Coverdell's \$5.9 million), Nevada (challenger John Ensign raised \$3.4 million compared to incumbent Harry Reid's \$3.9 million), New York (challenger Charles Schumer raised \$16.3 million compared to incumbent Alfonse D'Amato's \$17.6 million), Washington (challenger Linda Smith raised \$5.1 million compared to incumbent Patty Murray's \$5.3 million) and Wisconsin (challenger Mark Neumann raised \$4.4 million compared to incumbent Russell Feingold's \$4.1 million). See Appendix A, at 2a, 4a, 7a-8a, 12a.

⁹ Many political scientists have argued that it is more important for challengers to reach a minimum threshold of expenditures than to achieve total parity with the incumbent. See, e.g., Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 Am. Pol. Sci. Rev. 469 (1978).

amounts of money, but the successful fundraising efforts of so many other challengers suggests that, of the numerous factors that may have led to such inadequate financing, the \$1,000 contribution limit was not one of them.

A second indication that the \$1,000 contribution limit has not prevented challengers from running robust campaigns is the fact that since FECA was passed, overall campaign spending for congressional elections has outpaced inflation. Total congressional campaign expenditures increased more than six-fold from \$99.0 million for the 1975-76 election cycle to \$617.1 million¹⁰ for the 1997-98 election cycle, constituting an increase of 523.3%. See Frank J. Sorauf, *Inside Campaign Finance: Myths and Realities* 158 (1992); U.S. Fed. Election Comm'n, *1998 Congressional Financial Activity Declines* (Dec. 29, 1998) <<http://www.fec.gov/press/cn3098tx.htm>>. By contrast, prices increased by less than threefold, rising 182.1% over the same general period, as measured by the Consumer Price Index (for the period from 1976 to 1997). See U.S. Bureau of the Census, *supra*, at 489 tbl.772.

Perhaps most important of all, over more than two decades of experience with the \$1,000 federal limits, there is no evidence that incumbents have become more entrenched. While incumbents who run for re-election, particularly for House of Representatives seats, win in a high percentage of races, their success rate before and after passage of FECA has not materially changed.¹¹ From 1956 to 1974, 81.3% of incumbent

¹⁰ The 1997-98 election cycle expenditures are stated as of November 23, 1998, excluding expenditures in special elections and by candidates who lost in the primaries.

¹¹ See generally Gary C. Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the U.S. House of Representatives, 1952-82*, 31 Am. J. Pol. Sci. 126 (1987). Similarly, although the average margin of victory remains high for incumbents, this pattern was established in the 1960s and has not experienced any appreciable worsening since the enactment of FECA. See generally David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 Polity 295 (1974); Jacobson, *supra*.

U.S. Senators and 91.6% of incumbent U.S. Representatives were re-elected; from 1976 to 1996, 80.7% of incumbent Senators and 93.7% of incumbent Representatives were re-elected. See U.S. Bureau of the Census, *supra*, at 289 tbl.468; Norman J. Ornstein et al., *Vital Statistics on Congress, 1989-1990*, at 56-57 tbls.2-7 to 2-8 (1990).

The available data placed in the record from several statewide races held under Missouri's newly enacted contribution limits, although limited in nature, do not reveal a pattern markedly divergent from the federal experience with \$1,000 contribution limits. Of the statewide races for governor, lieutenant governor, secretary of state, attorney general and treasurer, general election campaign expenditures increased in three of the five races and average expenditures per candidate (including primaries) increased in four of the five races in 1996, after the enactment of Missouri's then-existing \$1,000 contribution limit, as compared to the amounts spent in 1992, when Missouri had no contribution limits. See *State Defs.' Suggestions Opp'n Pls.' Mot. Prelim. Inj. and Supp. State Defs.' Mot. Summ. J. Ex. A* (Campaign Finance Data from Recent Elections). Although total campaign expenditures (including primaries) decreased in the races for governor, treasurer and attorney general in 1996, those decreases appear likely to be attributable to the fact that all three races featured contested primaries without any incumbents in 1992, whereas the same races featured incumbents and no primaries in 1996. See *id.* The limited number of races constrains the conclusions that can be drawn, but experience under Missouri's statewide contribution limit has not manifested an appreciable impediment to candidates' ability to maintain adequately financed campaigns.

Our discussion of the campaign fundraising experience under the federal \$1,000 contribution limit should not be taken as an endorsement of \$1,000 contribution limits in particular. As noted above, many of us might favor higher or lower limits were we considering the issue as a matter of

legislative policy. What we do urge is that Legislatures should have latitude when fixing ethical rules governing campaign finance to determine the appropriate contribution limit so long as the limit does not become so low as to make it reasonably foreseeable that a challenger cannot raise sufficient funds to run a robust campaign. We urge this Court that the likelihood that a \$1,000 contribution limit runs afoul of this standard appears remote in light of the publicly available fundraising data. Moreover, we are aware of no systemic evidence to the contrary, and Respondents have certainly placed none in the record. Under these circumstances, we urge that the Missouri Legislature's judgment that a \$1,075 contribution limit strikes the appropriate balance between the needs of preserving public confidence and ensuring robust campaigns should be respected.

POINT III

CERTAIN PRACTICAL CONSIDERATIONS SUPPORT THE MISSOURI STATEWIDE LIMIT

Ethical rules governing campaign finance that seek to avoid an appearance of impropriety and promote public confidence in government and the electoral process should be effective in real world terms. Therefore they should be evaluated in the context of how fundraising actually works. Three prevalent fundraising practices are particularly worthy of consideration. They are dialing for dollars, the impact of contribution limits on the "giving pyramid," and self-financed candidates.

A. Dialing for Dollars

Dialing for dollars is the practice whereby a candidate directly contacts a potential contributor to get that contributor to pledge a specific amount on the spot. In urban areas, runners are often used to pick up the check immediately

following the call. The practice is widespread¹² but candidates do not enjoy doing it.¹³ Some have cited dialing for dollars as a reason not to run for office or not to seek re-election.¹⁴

Because of the ethical problems with direct solicitation by the candidate, some favor barring direct solicitation of money by candidates for certain offices such as judgeships and dis-

¹² See, e.g., Ceci Connolly, *Democrats Leading Dash for Cash in Some Key House Contests*, Wash. Post, July 18, 1998, at A6 (quoting the chairman of the Democratic Congressional Campaign Committee as advising candidates that "[y]ou have got to devote an enormous amount of your personal time . . . on the phone and in person asking for money"); Elaine S. Povich & Ellen Yan, *Can Cash Magnet Attract Votes?*, Newsday, July 3, 1998, at A21 (reporting the opinion of a political consultant who had worked on more than 100 campaigns that the "successful candidates are the ones who realize they must bow their heads over the phones for hours each day"); Tim Nickens, *Calling All Contributions*, St. Petersburg Times, June 15, 1998, at 1D (describing a "typical day" for Florida gubernatorial candidate Rick Dantzler during the Democratic primary campaign as "[d]ial for dollars between 9:30 and noon . . . Hit the phones again from 1:30 to 5 p.m. . . . [and return] to the barren downtown office to make calls from 7:30 to 9 p.m.").

¹³ See, e.g., Paul Kane, *Reaction to Lautenberg*, States News Service, Feb. 17, 1999 (quoting U.S. Representative William Pascrell as stating that "You've got to sit down and make calls from a private phone for hours and hours a week . . . It detracts from what you're sent there to do"), available in LEXIS, Cmpgn Library, Curnws File; Bill Steigerwald, *Moral Victory: On the Way to His Landslide Loss to Congressman Ron Klink, Mike Turzai Discovered That Even in Politics, Some Things Are More Important Than Winning*, Pittsburgh Post-Gazette, Nov. 8, 1998, Lifestyle, at G1 (reporting that U.S. Representative candidate Mike Turzai spent several hours a day dialing for dollars during his campaign and hated it, stating that "[i]t's the crass part of it . . . but you can't have a winning campaign without it").

¹⁴ See, e.g., Amy Westfeldt, *Lautenberg Won't Seek Fourth Term*, Associated Press, Feb. 18, 1999 (reporting U.S. Senator Frank Lautenberg's explanation that he would not run for re-election because "[t]he compelling factor . . . was the searing reality that I would have had to spend half of every day between now and the next election fund raising"), available in LEXIS, Cmpgn Library, Curnws File.

strict attorney. *See, e.g.,* Op. N.Y. City Bar Comm. Professional and Judicial Ethics No. 1994-7 (May 16, 1994) (opining that candidates for Attorney General, District Attorney and similar offices, "like candidates for judicial office, . . . should not personally solicit campaign contributions" but instead "should establish committees to do so and . . . avoid learning the names of the contributors and the amount of their donations"), available in LEXIS, Ethics Library, Nycbar File. Also, direct solicitation by an incumbent creates a particularly strong appearance of impropriety. The public can reasonably believe that specific matters pending before the incumbent are discussed during such direct solicitation. Of course the incumbent cannot as a practical matter be barred from direct solicitation without barring his or her adversaries as well.

Lower contribution limits sharply constrain the ethical objection to dialing for dollars. Because the favor being asked is limited, the favor that can be asked in return is also limited. The public can reasonably conclude that the conversation that surrounds a modest request differs not just in degree but in order of magnitude from the conversation that accompanies a large request, even a request for \$1,000.

Nor is there reason to believe that a \$1,000 limit eliminates a candidate's ability to raise enough money to conduct a robust campaign. Some have argued that as the contribution limit is lowered the candidate has to call so many more people that dialing for dollars becomes an impossible burden. This is not the case for several reasons.

First, the lowered "production" from dialing for dollars affects all the candidates in the race. Time spent on this activity is influenced by what is required to be competitive and if the rules are the same for everyone there is no *a priori* reason to believe that the amount of time spent on this activity will increase if, for example, the limit is \$1,000 as opposed to \$2,000.

Second, anecdotal evidence suggests that when contribution limits are lowered candidates will shift from calling to ask for a specific contribution pledge to calling to ask for a commitment to raise a specific amount from other donors. For example in Florida, where the contribution limit is \$500, the St. Petersburg Times recently quoted the executive director of the Florida Democratic party as saying "It's calling and saying, 'I need you to raise \$ 10,000 for me,' not that you call everyone who is contributing the \$10,000." Tim Nickens, *Calling all Contributions*, St. Petersburg Times, June 15, 1998, at 1D.

Of course it is fair to ask whether this shift benefits public confidence in government. The answer is that it does. Surrogates in direct conversation with contributors are not in a position to make a deal to anywhere near the extent that the candidate is. And as for contact between the candidate and the fundraiser, gratitude for fundraising effort in the context of low contribution limits is less likely to impair public confidence in government than is gratitude for the large gift that the fundraiser could have given directly. To the contrary, fundraising effort, like other volunteer work, is an important form of civic participation to be encouraged.

B. The Giving Pyramid

The giving pyramid is a pictorialization of the principle that as the amount of the contribution goes up the number of contributors giving that amount goes down. A chart of the number of contributors at various giving levels will look like a pyramid with the relatively few largest contributors at the top and a broader base of smaller contributors on the bottom.

The effect of a contribution limit is to cut off the top of the pyramid so that it looks like the truncated pyramid on the back of a one dollar bill. The contributors who were at the top of the pyramid, however, do not all disappear. Some drop out because the contribution is now a waste of time from the

point of view of buying influence, but those who were contributing because of true support should remain. The number of the contributors making the maximum, permissible contribution therefore increases as those who would have given more reduce their contributions to the statutory limit.

Consider, for example, the impact of reducing a \$2,000 contribution limit to \$1,000. At this level it is reasonable to assume that few of the \$2,000 contributors will drop out. Even the influence seekers will give \$1,000 because this number is high enough to provoke clear gratitude on the part of the candidate. Because of the giving pyramid, the number of these former \$1,001 to \$2,000 contributors who are now contributing \$1,000 (i.e., those who were at the top of the pyramid) is almost certainly fewer than the number who under the old \$2,000 limit were contributing at the \$1,000 level or below (i.e., those who were at the base of the pyramid). For this reason, a halving of the contribution limit results in nowhere near a halving of the revenue. To the contrary, as a matter of mathematics, and assuming no drop outs, the loss of revenue is equal to the number of contributions between \$1,000 and \$2,000 under the old limit multiplied by an amount equal to the average amount of such contributions minus \$1,000. For example, a campaign which under a \$2,000 contribution limit raised a total of \$3.4 million, one half of which came from contributions in excess of \$1,000 and where the average amount of these excess contributions was \$1,700, the loss of revenue from the reduction of the contribution limit to \$1,000 is \$700,000 or 21%. If the base is broader such that one-third of the revenue comes from contributions in excess of \$1,000, the loss of revenue is \$466,667 or 14%.

This analysis is not empirical and is therefore only suggestive of sensitivity to the amount raised at levels between the old and new contribution limits. However, we do know that in the most recent Senate races approximately one-third of all contributions were under \$500 and in House races approximately 44% of all contributions were under \$500. *See*

Research and Policy Comm., Committee for Econ. Dev., *Investing in the People's Business: A Business Proposal for Campaign Finance Reform* 14 (1999). It is thus highly possible that in a \$2,000 limit regime, more than a majority of the contributions would be in the amount of \$1,000 or below. It is also worth noting that in the race at issue here only 2 percent of the campaign contributions would have been affected had the \$1,075 limit not been enjoined.

Further since it is no longer necessary to spend effort upgrading \$1,000 contributors to \$1,500 or \$2,000 contributors, that time can now be devoted either to finding new contributors or to upgrading contributors below \$1,000. Thus without any increase in effort, the revenue loss is mitigated so that it falls below the numbers and percentages just mentioned.

Also a reduction in the contribution limit may well encourage campaigns to spend more effort increasing the number of contributions lower down in the giving pyramid. This promotes the State's interest in reducing the appearance of impropriety. A campaign which relies more heavily on \$500 or \$250 contributions is less likely to be perceived as having been bought by the "monied interests."

It is thus apparent that the calibration of specific contribution limits is a complex process. The effect on a candidate's total revenue of even a 100% difference in contribution limits is difficult to assess, and depends on the structure of the candidate's giving pyramid, the candidate's change in fundraising tactics in response to the contribution limit, and numerous other factors. Any decrease in revenue, moreover, does not translate directly into proportionally decreased chances for electoral victory. All other candidates must operate under the same constraints, and in any event, there is no evidence of a linear relationship between total contributions and chances of success.

None of these considerations was taken into account by the court below. The danger of that court's approach is apparent. The Legislature, consulting the opinion, would have no guidance as to what limits would be held permissible. If Missouri nonetheless raised the limit to attempt to comply with the court's analysis, the Eighth Circuit would have no way of knowing whether the change made a substantial difference, let alone one that overcame the constitutional deficiencies it perceived in the \$1,075 limit. Ultimately, there would be no principled way to divide constitutional limits from unconstitutional ones. In each case, the court would apply a seat-of-the-pants or "common sense" guess as to the effect of a specific limit. For the foregoing reasons, common sense is likely to overstate the effect of any limit. An accurate calculus requires a far more complex analysis than that employed by the court below. It is therefore prudential that the judiciary confine itself to decide whether the limit falls below a floor that is necessary to allow a challenger to run a robust race.¹⁵

C. The Self-Financed Candidate

Self-financed candidates are an important part of the political landscape.¹⁶ As noted above, the incumbent's fear of a self-financed challenger is one reason this Court can have

¹⁵ It is only when contribution limits are so extreme as to hinder the emergence of effective challengers, or to disadvantage political minorities, that the judiciary ought to interfere; otherwise, adjustments to or outright repeal of campaign finance regulation should be left to the political process. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁶ See, e.g., Ceci Connolly, *Huge Money Chase Marks 2000 Race; Some in GOP May Forgo Federal Funds*, Wash. Post, Feb. 28, 1999, at A1 (reporting that Texas Governor George W. Bush may forgo federal funding and its accompanying spending limits in the 2000 presidential campaign in order to compete with self-financed candidate Malcolm S. Forbes, who spent \$32 million of his own money in the 1996 presidential campaign).

confidence that State Legislatures will not fix excessively low contribution limits. However, since the ability of a candidate to compete against a self-financed candidate should be a part of the overall First Amendment analysis, we consider it briefly here.

We urge that so long as the reduced contribution limit allows the candidate with plausible voter appeal to raise enough for a robust campaign, the self-financed candidate should not be used as a bogey man to strike down a contribution limit fixed by a State Legislature. First, as we have shown, the drop in fundraising revenue is not proportional to the drop in the contribution limit and can be mitigated both through freed up effort and new effort. Second, self-financed candidates often have access to such awesome resources that the financial advantage due to wealth overwhelms any increase in that advantage due to the reduction in the contribution limit. Finally, if a candidate has enough money to get out the message, opposition by a self-financed candidate can be a potent ground for an appeal to contribute, to increase contributions or to devote time as a volunteer to soliciting contributions within the limit.

CONCLUSION

For the foregoing reasons and for the reasons advanced in the Petitioners' brief herein, it is respectfully submitted that the question presented in the Petition should be answered in the affirmative, or in the event that this Court reviews all aspects of the judgment below, that the judgment should be reversed and judgment entered in favor of Petitioners granting Summary Judgment herein.

Respectfully submitted,

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APPENDICES

Appendix A¹

1998 U.S. Senate Campaign	<u>WINNER</u>	<u>LEADING OPPONENT</u>
Alabama Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Richard Shelby (R) I \$1,881,403 \$3,517,321 / \$1,814,161	Clayton Suddith (D) C \$15,723 \$16,058 / \$11,069
Alaska Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Frank Murkowski (R) I \$811,199 \$1,422,987 / \$556,943	Joseph Sonneman (D) C \$24,699 \$24,083 / \$16,679

¹ Information for 1998 and 1996 U.S. Senate campaigns compiled from reports prepared by the Federal Election Commission, available at <<http://www.fec.gov/finance/state198.htm>> (visited Mar. 28, 1999) and <<http://www.fec.gov/state1.htm>> (visited Mar. 28, 1999). Fundraising data for 1994 and 1992 U.S. Senate campaigns compiled from reports prepared by Public Disclosure, Inc., available at <http://www.tray.com/fecinfo/_states.htm> (visited Mar. 28, 1999). Election results for 1994 and 1992 U.S. Senate campaigns compiled from reports available at 50 Cong. Q. Almanac 584-91 (1995) and 48 Cong. Q. Almanac, app. A at 35-A to 43-A (1993).

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Arizona Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	John McCain (R) I \$2,318,023 \$4,384,931 / \$3,122,128	Edward Ranger (D) C \$362,946 \$363,872 / \$180,991
Arkansas Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Blanche Lambert Lincoln (D) O \$6,067,910 \$2,976,086 / \$1,731,434	Fay W. Boozman (R) O \$1,071,147 \$1,082,684 / \$895,583
California Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Barbara Boxer (D) I \$13,514,566 \$12,678,231 / \$10,032,967	Matthew Fong (R) C \$10,715,308 \$10,790,308 / \$9,129,210

2

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Colorado Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Ben Nighthorse Campbell (R) I \$1,908,107 \$2,499,363 / \$1,415,745	Dorothy Lamm (D) C \$1,490,928 \$1,644,830 / \$1,433,082
Connecticut Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Christopher Dodd (D) I \$3,300,008 \$3,855,333 / \$2,554,282	Gary Franks (R) C \$1,297,886 \$1,318,984 / \$1,057,444
Florida Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Bob Graham (D) I \$5,018,201 \$4,328,533 / \$2,840,567	Charles Crist (R) C \$1,481,254 \$1,334,119 / \$1,215,627

3a

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Georgia Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Paul Coverdell (R) I \$6,870,211 \$5,883,271 / \$3,931,203	Michael Coles (D) C \$5,035,565 \$5,188,366 / \$1,030,715
Hawaii Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Daniel Inouye (D) — I \$1,318,242 \$1,712,877 / \$1,115,497	
Idaho Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Mike Crapo (R) O \$1,492,987 \$1,793,383 / \$676,155	William Mauk (D) O \$239,335 \$242,114 / \$151,814

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Illinois Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Peter Fitzgerald (R) C \$14,562,079 \$14,830,916 / \$2,130,099	Carol Moseley Braun (D) I \$7,101,417 \$7,177,624 / \$5,638,506
Indiana Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Evan Bayh (D) O \$3,876,963 \$4,136,060 / \$2,726,198	Paul Helmke (R) O \$645,100 \$645,306 / \$573,004
Iowa Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Charles Grassley (R) I \$2,735,354 \$3,277,658 / \$1,682,347	David Osterburg (D) C \$163,001 \$164,884 / \$136,179

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Kansas Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Samuel Brownback (R) I \$1,485,418 \$1,968,533 / \$1,096,786	Paul Feleciano (D) C \$38,413 \$39,450 / \$26,450
Kentucky Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Jim Bunning (R) O \$3,710,909 \$3,583,366 / \$2,060,998	Henry Scott Baesler (D) O \$3,698,257 \$3,755,446 / \$2,344,926
Louisiana Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	John Breaux (D) I \$3,800,341 \$3,970,068 / \$2,102,140	James Donelon (R) C \$312,771 \$313,414 / \$268,670

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Maryland Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Barbara Mikulski (D) I \$2,967,543 \$2,899,522 / \$1,855,335	Ross Pierpont (R) C \$55,413 \$66,325 / \$275
Missouri Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Christopher Bond (R) I \$6,154,328 \$5,843,525 / \$3,635,788	Jeremiah Nixon (D) C \$2,654,833 \$2,569,296 / \$1,949,630
Nevada Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Harry Reid (D) I \$4,866,893 \$3,850,952 / \$2,436,724	John Ensign (R) C \$3,474,565 \$3,407,718 / \$1,955,409

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
New Hampshire Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Judd Gregg (R) I \$877,838 \$1,161,451 / \$379,036	George Condodemetraky (D) C \$25,045 \$35,827 / \$26,477
New York Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Charles Schumer (D) C \$16,344,040 \$16,349,643 / \$9,990,264	Alfonse D'Amato (R) I \$23,991,135 \$17,630,242 / \$14,459,869
North Carolina Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	John Edwards (D) C \$8,050,297 \$8,127,278 / \$2,083,746	Lauch Faircloth (R) I \$9,269,910 \$9,296,263 / \$5,049,330

8a

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
North Dakota Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Byron Dorgan (D) I \$1,657,962 \$1,839,427 / \$704,022	Donna Nalewaja (R) C \$82,332 \$112,559 / \$100,742
Ohio Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	George Voinovich (D) O \$6,594,371 \$5,872,529 / \$4,240,574	Mary Boyle (D) O \$2,212,668 \$2,228,290 / \$1,683,838
Oklahoma Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Don Nickles (R) I \$2,381,198 \$2,699,927 / \$1,356,499	Donald Carroll (D) C \$5,474 \$8,619 / \$5,737

9a

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Oregon Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Ron Wyden (D) I \$2,767,857 \$3,268,629 / \$2,183,630	John Lim (R) C \$409,083 \$410,652 / \$388,050
Pennsylvania Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Arlen Specter (R) I \$4,463,532 \$6,222,117 / \$4,481,790	William Lloyd (D) C \$151,619 \$154,681 / \$71,973
South Carolina Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Ernest Hollings (D) I \$4,851,235 \$4,532,372 / \$3,063,159	Robert Inglis (R) C \$2,126,062 \$2,199,741 / \$1,613,898

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
South Dakota Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Thomas Daschle (D) I \$4,694,553 \$5,459,892 / \$3,432,597	Ronald Schmidt (R) C \$474,060 \$533,280 / \$413,181
Utah Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Robert Bennett (R) I \$1,156,251 \$1,332,162 / \$543,476	Scott Leckman (D) C \$262,891 \$269,564 / \$153,727
Vermont Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Patrick Leahy (D) I \$949,169 \$1,149,353 / \$1,107,867	

1998 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Washington Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Patty Murray (D) I \$5,510,662 \$5,277,529 / \$4,051,407	Linda Smith (R) C \$5,004,691 \$5,117,591 / \$5,041,254
Wisconsin Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Russell Feingold (D) I \$3,814,390 \$4,068,343 / \$3,606,849	Mark Neumann (R) C \$4,316,928 \$4,405,098 / \$3,675,252

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Alabama Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Jeff Sessions (R) O \$3,862,359 \$3,905,870 / \$2,878,517	Roger Bedford (D) O \$2,284,801 \$2,413,249 / \$1,798,551
Alaska Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Ted Stevens (R) I \$2,711,710 \$3,271,582 / \$1,638,409	Theresa Obermeyer (D) C
Arkansas Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Tim Hutchinson (R) O \$1,604,014 \$1,691,276 / \$920,732	Winston Bryant (D) O \$1,577,838 \$1,606,053 / \$1,009,455

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Colorado Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Wayne Allard (R) O \$2,233,429 \$2,198,131 / \$1,061,594	Thomas Strickland (D) O \$4,894,916 \$2,913,066 / \$1,672,623
Delaware Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Joseph Biden (D) I \$1,966,313 \$1,636,013 / \$1,539,910	Raymond Clatworthy (R) C \$1,126,427 \$1,132,167 / \$814,664
Georgia Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Joseph Cleland (D) O \$2,926,391 \$2,944,283 / \$2,135,173	Guy Millner (R) O \$9,858,955 \$9,917,102 / \$2,730,641

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Idaho Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Larry Craig (R) I \$2,809,897 \$2,695,939 / \$1,614,572	Walter Minnick (D) C \$2,140,878 \$2,179,155 / \$1,089,168
Illinois Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Richard Durbin (D) O \$4,966,804 \$4,767,940 / \$3,394,275	Al Salvi (R) O \$4,696,065 \$4,698,956 / \$3,249,981
Iowa Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Tom Harkin (D) I \$5,276,708 \$4,665,182 / \$3,390,007	Jim Ross Lightfoot (R) C \$2,439,679 \$2,474,871 / \$1,731,607

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Kansas Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Pat Roberts (R) O \$2,305,898 \$2,297,886 / \$988,657	Sally Thompson (D) O \$659,066 \$662,523 / \$379,416
Kentucky Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Mitch McConnell (R) I \$4,669,642 \$3,840,374 / \$2,315,609	Steven Beshear (D) C \$2,073,794 \$1,879,343 / \$1,589,524
Louisiana Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Mary Landrieu (D) O \$2,504,815 \$2,689,202 / \$2,052,614	Louis Jenkins (R) O \$1,878,242 \$1,879,675 / \$1,368,421

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Maine Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Susan Collins (R) O \$1,621,475 \$1,721,825 / \$1,055,237	Joseph Brennan (D) O \$976,805 \$978,848 / \$610,588
Massachusetts Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	John Kerry (D) I \$10,962,607 \$10,342,115 / \$7,843,781	William Weld (R) C \$8,002,123 \$8,074,417 / \$7,062,001
Michigan Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Carl Levin (D) I \$5,905,737 \$6,009,422 / \$4,927,853	Ronna Romney (R) C \$3,141,502 \$3,175,110 / \$2,852,648

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Minnesota Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Paul Wellstone (D) I \$5,979,224 \$5,991,013 / \$5,288,600	Rudy Boschwitz (R) C \$4,385,982 \$4,399,974 / \$3,286,786
Mississippi Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Thad Cochran (R) I \$828,693 \$787,233 / \$182,799	James Hunt (D) C
Montana Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Max Baucus (D) I \$3,748,502 \$3,449,478 / \$1,951,665	Dennis Rehberg (R) C \$1,358,165 \$1,369,530 / \$854,353

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Nebraska Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Chuck Hagel (R) O \$3,564,316 \$3,612,338 / \$2,042,067	E. Benjamin Nelson (D) O \$2,159,653 \$2,179,131 / \$1,098,301
New Hampshire Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Robert C. Smith (R) I \$1,718,413 \$1,708,376 / \$782,076	Dick Swett (D) C \$1,558,563 \$1,759,089 / \$1,330,736
New Jersey Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Robert Torricelli (D) O \$9,134,854 \$9,211,508 / \$6,112,877	Dick Zimmer (R) O \$8,238,181 \$8,212,612 / \$5,525,662

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
New Mexico Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Pete Dominici (R) I \$3,110,548 \$3,264,601 / \$1,973,035	Art Trujillo (D) C \$155,213 \$155,328 / \$135,907
North Carolina Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Jesse Helms (R) I \$7,798,520 \$7,808,820 / \$6,614,683	Harvey Gantt (D) C \$7,992,980 \$8,108,548 / \$7,619,519
Oklahoma Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	James Inhofe (R) I \$2,510,946 \$2,706,849 / \$1,479,750	James Boren (D) C \$301,621 \$302,633 / \$144,839

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Oregon Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Gordon Smith (R) O \$3,527,252 \$3,603,253 / \$2,477,601	Thomas Bruggere (D) O \$3,301,736 \$3,318,883 / \$1,345,801
Rhode Island Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Jack Reed (D) O \$2,732,011 \$2,688,136 / \$1,511,660	Nancy Meyer (R) O \$773,789 \$787,231 / \$506,674
South Carolina Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Strom Thurmond (R) I \$2,385,185 \$2,335,746 / \$1,482,889	Elliott Clouse (D) C \$1,913,574 \$1,919,735 / \$934,382

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
South Dakota Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Tim Johnson (D) C \$2,990,554 \$2,866,518 / \$1,938,050	Larry Pressler (R) I \$4,468,434 \$4,091,490 / \$2,417,386
Tennessee Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Fred Thompson (R) I \$3,469,369 \$4,232,418 / \$2,923,085	Houston Gordon (D) C \$795,969 \$800,607 / \$628,137
Texas Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Phil Gramm (R) I \$6,289,591 \$3,802,167 / \$2,262,727	Victor Morales (D) C \$978,862 \$991,290 / \$938,138

1996 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Virginia Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	John Warner (R) I \$5,196,091 \$5,033,390 / \$2,955,543	Mark Warner (D) C \$11,600,424 \$11,625,483 / \$1,092,052
West Virginia Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Jay Rockefeller (D) I \$2,538,473 \$3,004,275 / \$1,884,185	
Wyoming Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Michael Enzi (R) O \$953,572 \$984,906 / \$453,734	Kathy Karpan (D) O \$814,258 \$819,417 / \$460,538

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Arizona Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Jeff Kyl (R) O \$4,138,203 \$4,314,138 / \$2,530,518	Sam Coppersmith (D) O \$1,582,320 \$1,583,359 / \$1,070,857
California Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Diane Feinstein (D) I \$14,419,656 \$14,597,791 / \$9,271,008	Michael Huffington (R) C \$29,888,919 \$29,912,116 / \$1,482,063
Connecticut Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Joseph Lieberman (D) I \$3,238,396 \$3,874,610 / \$2,580,733	Jerry Laabriola (R) C \$166,064 \$168,067 / \$115,912

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Delaware Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	William Roth Jr. (R) I \$2,233,279 \$2,220,825 / \$1,196,970	Charles Oberly (D) C \$1,561,440 \$1,579,006 / \$1,093,287
Florida Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Connie Mack (R) I \$3,735,719 \$4,364,771 / \$3,144,233	Hugh Rodham (D) C \$621,304 \$634,583 / \$459,919
Hawaii Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Daniel Akaka (D) I \$421,356 \$622,945 / \$301,761	Maria Hustace (R) C \$30,272 \$29,815 / \$20

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Indiana Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Richard Lugar (R) I \$4,063,703 \$3,122,705 / \$2,116,740	Jim Jontz (D) C \$472,488 \$488,714 / \$223,920
Maine Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Olympia Snowe (R) O \$2,041,834 \$2,309,912 / \$1,330,214	Thomas Andrews (D) O \$1,482,060 \$1,506,154 / \$1,242,612
Maryland Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Paul Sarbanes (D) I \$2,698,928 \$2,702,116 / \$1,621,513	William Brock (R) C \$3,201,650 \$3,204,925 / \$1,346,880

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Massachusetts Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Edward Kennedy (D) I \$10,540,244 \$9,816,808 / \$8,201,215	W. Mitt Romney (R) C \$7,624,491 \$7,628,061 / \$4,482,702
Michigan Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Spencer Abraham (R) O \$4,458,073 \$4,511,046 / \$3,624,362	Bob Carr (D) O \$3,041,603 \$3,071,396 / \$1,375,365
Minnesota Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Rod Grams (R) O \$2,439,798 \$2,548,996 / \$1,686,589	Ann Wynia (D) O \$2,742,513 \$2,751,725 / \$2,112,469

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Mississippi Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Trent Lott (R) I \$2,134,544 \$2,490,825 / \$1,360,361	Ken Harper (D) C \$366,476 \$367,003 / \$96,404
Missouri Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	John Ashcroft (R) O \$4,063,927 \$4,182,215 / \$3,004,156	Alan Wheat (D) O \$3,505,701 \$3,461,649 / \$2,279,636
Montana Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Conrad Burns (R) I \$3,243,392 \$3,090,696 / \$1,568,833	Jack Mudd (D) C \$1,107,591 \$1,120,638 / \$695,734

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Nebraska Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Bob Kerrey (D) I \$4,471,081 \$4,400,801 / \$2,971,921	Jan Stoney (R) C \$1,871,778 \$1,896,787 / \$1,455,235
New Jersey Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Frank Lautenberg (D) I \$7,278,332 \$6,443,199 / \$3,833,549	Garabed Hataian (R) C \$5,114,532 \$5,114,672 / \$4,542,417
New Mexico Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Jeff Bingaman (D) I \$3,229,398 \$2,859,334 / \$1,460,537	Colin McMillan (R) C \$1,543,836 \$1,555,470 / \$856,599

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
New York Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contribution	Daniel Patrick Moynihan (D) I \$5,784,736 \$5,245,823 / \$3,236,513	Bernadette Castro (R) C \$1,581,901 \$1,582,667 / \$424,952
Nevada Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Richard Bryan (D) I \$3,021,834 \$3,029,661 / \$1,687,693	Hal Furman (R) C \$885,430 \$885,824 / \$506,252
North Dakota Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Kent Conrad (D) I \$1,927,866 \$1,839,573 / \$313,043	Ben Clayburgh (R) C \$961,192 \$990,519 / \$546,681

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Ohio Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contribution	Mike DeWine (R) O \$6,337,813 \$6,347,428 / \$4,504,962	Joel Hyatt (D) O \$4,773,905 \$4,274,071 / \$2,938,005
Pennsylvania Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Rick Santorum (R) C \$6,732,849 \$6,850,767 / \$5,289,626	Harris Wofford (D) I \$6,300,560 \$5,918,433 / \$4,450,489
Rhode Island Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	John Chafee (R) I \$1,896,589 \$2,146,027 / \$1,032,768	Linda Kushner (D) C \$278,018 \$822,799 / \$278,018

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Tennessee (Full Term) Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Bill Frist (R) C \$9,843,152 \$9,852,040 / \$3,050,415	Jim Sasser (D) I \$4,717,147 \$4,448,053 / \$2,475,786
(Short Term) Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Fred Thompson (R) O \$3,844,559 \$3,887,713 / \$3,153,110	Jim Cooper (D) O \$3,979,425 \$4,016,192 / \$3,545,077
Texas Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Kay Bailey Hutchinson (R) I \$12,507,343 \$13,931,819 / \$11,027,744	Richard Fisher (D) C \$5,876,512 \$5,891,859 / \$1,695,185

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Utah Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Orrin Hatch (R) I \$3,779,231 \$3,742,849 / \$2,021,934	Patrick Shea (D) C \$311,491 \$314,604 / \$154,560
Virginia Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Charles Robb (D) I \$5,501,697 \$5,502,523 / \$4,005,353	Oliver North (R) C \$20,607,367 \$20,770,879 / \$20,555,200
Vermont Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	James Jeffords (R) I \$1,119,592 \$1,011,383 / \$230,426	Jan Backus (D) C \$313,184 \$421,303 / \$168,156

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Washington Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Slade Gorton (R) I \$4,792,764 \$4,755,977 / \$3,325,996	Ron Sims (D) C \$1,228,098 \$1,238,575 / \$888,165
West Virginia Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Robert Byrd (D) I \$1,550,354 \$1,274,338 / \$205,257	Stan Klos (R) C \$267,165 \$271,006 / \$130,335
Wisconsin Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Herb Kohl (D) I \$7,374,312 \$7,388,348 / \$382,098	Robert Welch (R) C \$1,265,382 \$1,266,192 / \$885,074

1994 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Wyoming Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Craig Thomas (R) O \$1,068,335 \$1,395,139 / \$494,068	Mike Sullivan (D) O \$726,991 \$727,710 / \$447,995

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Alabama Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Richard Shelby (D) I \$2,451,01991 \$2,816,778 / \$1,369,737	Richard Sellers (R) C \$149,578 \$149,603 / \$28,680
Alaska Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Frank Murkowski (R) I \$1,663,865 \$1,672,932 / \$817,511	Tony Smith (D) C \$910,138 \$913,975 / \$587,837
Arizona Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	John McCain (R) I \$3,481,915 \$3,344,311 / \$2,011,847	Claire Sargent (D) C \$287,681 \$288,412 / \$152,472

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Arkansas Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Dale Bumpers (D) I \$1,878,472 \$1,940,691 / \$1,199,014	Mike Huckabee (R) C \$910,212 \$905,215 / \$866,176
California (Full Term) Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Barbara Boxer (D) O \$10,396,809 \$10,393,951 / \$8,759,548	Bruce Herschensohn (R) O \$7,862,476 \$7,918,663 / \$6,773,002
(Short Term) Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Dianne Feinstein (D) C \$8,053,387 \$8,114,032 / \$6,740,790	John Seymour (R) I \$6,849,805 \$6,908,617 / \$5,359,710

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Colorado Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Ben Nighthorse Campbell (D) O \$1,561,347 \$1,594,544 / \$830,642	Terry Considine (R) O \$2,645,791 \$2,704,514 / \$1,351,195
Connecticut Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Christopher Dodd (D) I \$4,112,462 \$3,827,475 / \$2,353,386	Brook Johnson (R) C \$2,395,462 \$2,399,715 / \$430,063
Florida Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Bob Graham (D) I \$2,979,552 \$3,026,137 / \$1,961,806	Bill Grant (R) C \$242,251 \$248,228 / \$192,316

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Georgia Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Wyche Fowler Jr. (D) I \$4,894,620 \$4,322,671 / \$2,601,696	Paul Coverdell (R) C \$3,191,378 \$3,300,867 / \$2,557,148
Hawaii Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Daniel K. Inouye (D) I \$2,964,345 \$2,752,692 / \$1,855,564	Rick Reed (R) C \$455,051 \$458,052 / \$312,241
Idaho Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Kirk Kempthorne (R) O \$1,305,338 \$1,351,127 / \$701,312	Richard Stallings (D) O \$1,222,222 \$1,224,232 / \$580,837

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Illinois Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Carol Moseley-Braun (D) O \$6,497,174 \$6,496,248 / \$5,627,193	Richard Williamson (R) O \$2,300,924 \$2,320,713 / \$1,825,246
Indiana Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Daniel Coats (R) I \$3,802,077 \$3,642,012 / \$2,213,623	Joseph Hogsett (D) C \$1,584,173 \$1,621,467 / \$1,093,652
Iowa Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Charles Grassley (R) I \$2,337,538 \$2,517,923 / \$1,326,262	Jean Lloyd-Jones (D) C \$410,894 \$415,829 / \$191,758

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Kansas Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Bob Dole (R) I \$1,990,098 \$2,362,936 / \$921,370	Gloria O'Dell (D) C \$226,347 \$214,733 / \$151,591
Kentucky Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Wendell Ford (D) I \$2,076,069 \$2,317,149 / \$809,483	David Williams (R) C \$335,304 \$345,291 / \$287,016
Louisiana Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	John Breaux (D) I \$1,446,199 \$2,449,803 / \$996,884	

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Maryland Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Barbara Mikulski (D) I \$3,161,104 \$2,940,047 / \$1,876,856	Alan Keyes (R) C \$1,178,791 \$1,185,385 / \$1,123,811
Missouri Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Christopher Bond (R) I \$4,577,895 \$4,069,717 / \$2,392,515	Geri Rothman-Serot (D) C \$1,155,187 \$1,156,647 / \$492,613
Nevada Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Harry Reid (D) I \$2,725,713 \$2,142,152 / \$1,092,258	Demar Dahl (R) C \$506,411 \$510,297 / \$353,736

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
New Hampshire Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Judd Gregg (R) O \$1,095,154 \$1,210,315 / \$576,126	John Rauh (D) O \$1,109,467 \$1,109,500 / \$391,129
New York Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Alfonse D'Amato (R) I \$12,866,533 \$10,224,230 / \$4,854,099	Robert Abrams (D) C \$6,609,945 \$6,975,203 / \$6,091,942
North Carolina Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Lauch Faircloth (R) C \$2,960,173 \$2,969,937 / \$1,795,936	Terry Sanford (D) I \$2,536,380 \$2,460,525 / \$1,526,180

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
North Dakota Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Kent Conrad (D) I \$2,110,684 \$1,732,692 / \$392,793	Jack Dalrymple (R) C \$282,104 \$300,843 / \$294,786
Ohio Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	John Glenn (D) I \$4,018,371 \$3,971,403 / \$1,895,381	Mike DeWine (R) C \$3,052,919 \$3,054,216 / \$2,183,466
Oklahoma Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Don Nickles (R) I \$3,316,336 \$3,235,075 / \$1,803,912	Steve Lewis (D) C \$1,455,848 \$1,456,533 / \$1,142,474

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Oregon Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Bob Packwood (R) I \$6,080,989 \$5,804,130 / \$4,148,217	Les AuCoin (D) C \$2,636,894 \$2,301,155 / \$1,440,913
Pennsylvania Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Arlen Specter (R) I \$8,854,815 \$6,882,059 / \$5,147,004	Lynn Yeakel (D) C \$5,298,861 \$5,300,624 / \$4,242,865
South Carolina Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Ernest Hollings (D) I \$3,642,045 \$2,736,893 / \$1,536,087	Thomas Hartnett (R) C \$886,816 \$907,376 / \$685,808

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
South Dakota Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Tom Daschle (D) I \$2,878,375 \$2,839,366 / \$1,390,437	Charlene Haar (R) C \$369,891 \$370,515 / \$245,654
Utah Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Robert Bennett (R) O \$3,797,369 \$3,965,576 / \$266,140	Wayne Owens (D) O \$1,904,750 \$1,934,683 / \$1,317,194
Vermont Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Patrick Leahy (D) I \$991,831 \$935,503 / \$498,830	James Douglas (R) C \$195,737 \$196,635 / \$168,635

1992 U.S. Senate Campaign	WINNER	LEADING OPPONENT
Washington Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Patty Murray (D) O \$1,342,038 \$1,496,204 / \$994,383	Rod Chandler (R) O \$2,504,777 \$2,592,759 / \$1,234,791
Wisconsin Candidate (Party) Incumbent, Challenger, Open Disbursements Receipts/Individual Contributions	Russell Feingold (D) C \$1,990,488 \$2,007,312 / \$1,476,615	Bob Kasten (R) I \$5,427,163 \$5,107,974 / \$3,538,629

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JEREMIAH W. NIXON,
ATTORNEY GENERAL OF MISSOURI, *et al.*,

Petitioners,

—v.—

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN and JOAN BRAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF FOR NORMAN DORSEN, BRUCE J. ENNIS,
CHARLES MORGAN, JR., ARYEH NEIER, JOHN
PEMBERTON, JOHN POWELL, and MELVIN L. WULF,
AMICI CURIAE, SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Did the Court of Appeals err in subjecting Missouri's \$1,075 campaign contribution limit for statewide office to strict scrutiny, and in holding that it violates the First Amendment?

INTEREST OF THE *AMICI CURIAE*¹

Amici, who file this brief with the consent of the parties, are civil libertarians: advocates for strong protection of freedom of speech, broadly conceived, and believers that the First Amendment guarantees just such capacious rights. Among their other responsibilities — teaching law, practicing law, leading a foundation deeply engaged in building freedom and civil society abroad — each has served in a leadership position with the American Civil Liberties Union.

Norman Dorsen served as ACLU General Counsel from 1969-1976 and as President of the ACLU from 1976-1991. Jack Pemberton and Aryeh Neier served as Executive Directors of the ACLU from 1962-1978. Melvin L. Wulf, Bruce J. Ennis, and John Powell served as National Legal Directors of the ACLU from 1972-1992. Charles Morgan, Jr. served as National Legislative Director of the ACLU from 1972-1976. With the exception of Burt Neuborne, who is counsel for respondent Joan Bray supporting petitioners in this case, and two other persons currently in government service and therefore not free to participate in this brief,² every living person to have served as ACLU President, ACLU Executive Director, ACLU Legal Director, or ACLU Legislative Director during the past 30 years, with the exception of the current leadership, has joined this brief supporting the validity of the Missouri

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

² Morton Halperin and John Shattuck, both former Legislative Directors of the ACLU, are now, respectively, Director of the Office of Policy Planning at the State Department and Ambassador to the Czech Republic.

limitations at issue. Each has previously signed a statement “supporting the constitutionality of efforts to enact reasonable campaign finance reform.”

Amici submit this brief supporting the Missouri law imposing ceilings on campaign contributions *not* because they believe that the particular ceilings at issue here are wise, but because of their intense belief that the Constitution does not prohibit them, and that well-meaning opponents of limits on campaign spending have misread the First Amendment in contending otherwise. *Amici* believe that, as long as ceilings on contributions do not endanger the ability of candidates to amass the funds needed for robust electoral advocacy, reasonable content neutral efforts to limit the potentially corrosive impact of money on electoral politics do not violate the First Amendment. Far from rendering contributions ceilings presumptively unconstitutional, the First Amendment and the democratic values it safeguards are vitally served when legislatures act to prevent the corruption of the political process by limiting the size of contributions, so long as those ceilings do not prevent candidates from amassing the resources necessary to engage in robust electoral advocacy.

SUMMARY OF ARGUMENT

Whatever else may be said about the analytical framework established by *Buckley v. Valeo*, 424 U.S. 1 (1976), *Buckley* was surely sound insofar as it recognized that the speech interests underlying contributions to candidates or campaigns are limited and are not so seriously threatened by contribution ceilings as to warrant exacting judicial scrutiny or to be presumptively immune from legislative regulation.

The speech interests underlying campaign contributions are the interest in signaling support for a candidate and the interest in fueling a candidacy. A ceiling on contributions

entails only a "marginal restriction" on those interests, *id.* at 20, since it "permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 21. Similarly, in the usual case, contribution ceilings do not significantly restrain the "fueling" interests, given the evident success candidates throughout the nation have had in obtaining huge campaign war chests while subject to the \$1,000 contribution limitation of federal law, and comparable success in states with similar ceilings.

In recognition of the modest impact contribution ceilings have on free speech interests, and the important non-content-based goals they serve — avoiding the appearance and reality of corruption — this Court's cases from *Buckley* onward have consistently subjected contribution ceilings to less-than-strict scrutiny.

Nothing in the record below suggested that either of the interests underlying contributions is so sufficiently threatened by Missouri's contribution limitations as to warrant judicial skepticism, strict scrutiny, or judicial invalidation of the attempt by Missouri's voters, acting through their legislators, to reform the political process so as to avoid the reality and appearance of corruption and make it more democratic in appearance and in fact.

ARGUMENT

I. UNDER *BUCKLEY V. VALEO*, THE ACT OF TRANSFERRING MONEY TO A CANDIDATE IMPLICATES ONLY LIMITED EXPRESSIVE INTERESTS, AND THE IMPOSITION OF REASONABLE CEILINGS ON THE SIZE OF CAMPAIGN CONTRIBUTIONS DOES NOT WARRANT FIRST AMENDMENT STRICT SCRUTINY, UNLESS THE CEILINGS UNDERMINE THE ABILITY OF CANDIDATES TO AMASS FUNDS NEEDED TO WAGE ROBUST CAMPAIGNS.

The current constitutional framework governing the regulation of political campaign contributions and expenditures took shape in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). Noting our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," *id.* at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), the Court considered both political contributions and campaign expenditures to constitute forms of expression that come within the free speech guarantee of the First Amendment. In some respects, the Court fused spending and speech into a single First Amendment concept, reasoning that spending money is a necessary precondition to campaign speech because "every means of communicating ideas in today's mass society requires the expenditure of money." *Id.* at 19. The Court analogized money to fuel, noting that just as an automobile cannot travel without gasoline, a political speaker cannot communicate effectively in the absence of money. *Id.* at 19 n.18.³

³ With respect, while the analogy is instructive in ways, it was also grievously imprecise, because a contested election campaign is not simply a drive in the country, with each
(continued...)

The Court also discerned, however, that fundamentally different First Amendment interests underlie *contributions to* candidates, than underlie spending decisions by candidates, parties, or individuals speaking directly to the public. The Court concluded that limitations on contributions ought not be subjected to strict scrutiny, and that judgment and the sound reasons supporting it ought to control this case.

³(...continued)

candidate freely making autonomous decisions about how much fuel to put in the car, but a competitive race in which participants' decisions about how much to spend are, in large part, reciprocally driven by the spending of opponents. Instead of a scenic drive in the family car, a more apt analogy would be to an arms race where both contestants wish to limit their spending, but neither dares do so because of a fear that its adversary will pull ahead. Uncontrolled campaign spending often resembles a classic arms race spiral, where opposing participants can become trapped in a prisoners' dilemma that can be resolved only by collective action. See Kenneth E. Abbott, "Trust But Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 Cornell Int'l L.J. 1 (1993). Whether sufficiently generous campaign spending ceilings that permit robust and vigorous advocacy but avoid an arms control spiral should be equated with censorship is a much closer question than the *Buckley* court viewed it, but that issue is not presented in this case, which concerns only contribution limitations, not spending limitations.

A. REASONABLE CONTRIBUTION CEILINGS IMPOSE ONLY A MARGINAL RESTRICTION ON A CONTRIBUTOR'S LEGITIMATE FIRST AMENDMENT INTERESTS.

The *Buckley* Court discerned fundamental differences in the expressive values underlying contributions and independent expenditures. The Court concluded that although both contribution and expenditure limitations implicate important expressive interests, expenditure ceilings "impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." *Buckley*, 424 U.S. at 23. Contribution ceilings entail only a "marginal restriction" upon the contributor's ability to engage in free communication because a contribution is simply a "general expression of support" and a "symbolic expression" signaling the contributor's support for a candidate and his or her views. As the Court wrote:

a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign

organization thus involves little direct restraint on political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. at 20-21 (footnote omitted).

Because campaign contributions are merely indirect efforts to "fuel" the speech of another, the Court concluded that the overall effect of the contribution ceilings at issue in *Buckley* was "merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Id.* at 22.

Similarly, although recognizing that both campaign contributions and independent expenditures are forms of political association, the Court recognized differences between the effect on associational freedoms of limitations on contributions, on the one hand, and spending, on the other. *Id.* Making a contribution "serves to affiliate a person with a candidate" and "enables like-minded persons to pool their resources in furtherance of common political goals." Those interests are not threatened by reasonable limitations such as the \$1,000 contribution ceiling at issue in *Buckley* because contribution limitations leave "the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates" and leave

"associations and candidates [free] to aggregate large sums of money to promote effective advocacy." *Id.*

In upholding the contribution limitations at issue in *Buckley*, the Court found "significant[]" that the "contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties," *id.* at 29, and that there was no indication that the contribution limitations "would have any *dramatic adverse effect* on the funding of campaigns and political associations." *Id.* at 21 (emphasis added). Contribution restrictions would only have a cognizable impact on political dialogue and first Amendment interests, the Court held, "if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.*

The Court's analysis of contribution limitations in *Buckley* thus recognized two important speech interests of which judicial review of campaign finance regulation must take account. *First*, restrictions must not be so restrictive as to curtail "robust and effective discussion of candidates and campaign issues." *Second*, restrictions must not be so restrictive as to curtail an individual contributor from signaling the fact and intensity of his (or her) support. *Id.* at 29.

With respect to the legislation before it, the Court concluded that "[i]t is unnecessary to look beyond the Act's primary purpose — to limit the actuality and appearance of corruption resulting from large individual financial contributions — in order to find a *constitutionally sufficient justification* for the \$1,000 contribution limitation," *id.* at 26 (emphasis added), and that "[t]he contribution ceilings thus serve the *basic governmental interest* in safeguarding the integrity of the electoral process without directly impinging upon the rights of

individual citizens and candidates to engage in political debate and discussion." *Id.* at 58 (emphasis added).

By contrast, the Court struck down expenditure limitations, holding that they placed "substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.*⁴

B. REASONABLE CAMPAIGN CONTRIBUTION CEILINGS ARE SUBJECT TO LESS-THAN-STRICT SCRUTINY.

The *Buckley* Court, in concluding its analysis of campaign contributions, stated that "under the *rigorous* standard of review established by our prior decisions, the *weighty interests* served by restricting the size of financial contributions to political candidates are *sufficient to justify* the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling." *Buckley*, 424 U.S. at 29 (emphasis added). Although the *Buckley* Court failed to articulate precisely what the "rigorous" standard of review

⁴ The expenditure limitations at issue in *Buckley* were unreasonably low. Spending for congressional campaigns was capped at \$70,000 for both the primary and general elections; spending for Senate campaigns was capped at 8 cents multiplied by the voting-age population or \$100,000 for the primary, and 12 cents multiplied by the voting age population or \$150,000 for the general election; and independent expenditures were capped at \$1,000. See *Buckley*, 424 U.S. at 39, 55. Since those unreasonably stringent limitations on expenditures would have materially interfered with campaigning, *amici* have no quarrel with the precise holding of *Buckley*. Whether more generous limits should similarly be equated with censorship is a much closer question not now before the Court. See n. 3, *supra*.

entailed, it was clearly less rigorous than the "exacting" scrutiny accorded to expenditure restrictions. Compare *id.* at 23-30 (review of contribution restrictions) with *id.* at 39-54 (review of expenditure restrictions). The Court's analysis of the contribution limitations was far from "strict" precisely because, as compared to spending regulations, contribution limitations have only a "marginal" effect on legitimate expressive values.

Finding that a limitation on contributions "involves little direct restraint on [a contributor's] political communication, for it permits the symbolic expression of support," and that the limitations allow for "robust and effective discussion of candidates and campaign issues," the Court suggested that contribution ceilings would be unconstitutional only where they have a dramatic adverse effect on a candidate's ability to raise campaign funds, thereby severely impacting political dialogue. *Id.* at 29. Presumably, contribution limitations flunk scrutiny only in those cases where they prevent candidates and political committees from amassing the resources necessary for effective advocacy. *Id.*

Cases subsequent to *Buckley* have consistently reaffirmed that contribution ceilings are ordinarily not subject to strict scrutiny. See, e.g., *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, n.16, 196 (1981) (plurality opinion) (contributions involve only "some *limited* element of protected speech," and the "speech by proxy" that is achieved through contributions to a political campaign committee "is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.") (emphasis added); *Federal Election Comm'n v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) ("NCPAC") (distinguishing expenditure limitations from limitations on contributions); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("[w]e have consistently held that restrictions on contributions require

less compelling justification than restrictions on independent spending.”) (citing *NCPAC*, *California Medical Ass’n*, and *Buckley*); *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 614-15 (1996) (plurality opinion) (the Court’s cases have found a “fundamental constitutional difference between money spent to advertise one’s views independently of the candidate’s campaign and money contributed to the candidate to be spent on his campaign.”) (citing *NCPAC*).

A comparable distinction — between regulations that substantially threaten First Amendment interests, which draw strict scrutiny, and those that impose relatively light burdens and are accordingly subject to less rigorous review — has been consistently applied to the related line of cases involving voting rights. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (“Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s “important regulatory interests” will usually be enough to justify “reasonable, nondiscriminatory restrictions.”) (citations omitted); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (rejecting petitioner’s assumption “that a law that imposes any burden upon the right to vote must be subject to strict scrutiny,” and noting that “the rigorousness” of the Court’s inquiry into the propriety of a challenged regulation depends on the extent to which that regulation burdens First and Fourteenth Amendment rights. If a statute imposes only “reasonable, nondiscriminatory restrictions” upon those rights, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.) (citation omitted).⁵

⁵ *Amici* believe that the Court in both *Timmons* and *Burdick* seriously undervalued the expressive aspects of voting.
(continued...)

The recognition that contribution ceilings serve important goals unrelated to the suppression of free expression and the resulting decision to subject them to less-than-strict scrutiny are consistent with the Court’s general First Amendment jurisprudence. The First Amendment interests underlying contributions are of course legitimate and important, but they are far more indirect than those accompanying expenditures: the speech interests implicated in campaign contributions are simply (1) to assure that a preferred candidate has enough money to “fuel” a robust and effective campaign; and (2) to “signal” the fact and intensity of a contributor’s support for a particular candidate. *Buckley*, 424 U.S. at 28-29.

As long as those two important First Amendment interests are not imperiled, a putative contributor has no further legitimate First Amendment interest, or at best only a modest one, in transferring unlimited sums of money to candidates for public office. Indeed, once a contributor’s legitimate “fueling” and “signaling” First Amendment interests are satisfied, the act of transmitting unlimited sums of money to candidates for public office is more accurately perceived as a form of regulable conduct, not as protected First Amendment activity. See *Colorado Republican Fed. Campaign Comm.*, 518 U.S. at 615. That is why, as the *Buckley* Court recognized, once a Presidential candidate opts for public funding (thereby assuring that a putative contributor’s “fueling” interest is satisfied), contributors may be forbidden from making any contributions directly to the Presidential candidate. *Buckley*, 424 U.S. at 95, n.129.

⁵(...continued)
leaving the outcomes in both cases subject to criticism.

So long as Missouri's regulatory scheme does not significantly impinge upon a contributor's legitimate First Amendment "fueling" and "signaling" interests, no reason exists to impose any level of heightened First Amendment scrutiny upon it.

II. THE STRICT SCRUTINY APPLIED BY THE EIGHTH CIRCUIT WAS AN UNWARRANTED STANDARD OF REVIEW.

Failing to recognize the distinction between contribution ceilings and expenditure ceilings (which this Court described as "established principle" in *Colorado Republican Fed. Campaign Comm.*, 518 U.S. at 615), and that this case involves only contribution ceilings, the Eighth Circuit strictly scrutinized the limitations at issue, requiring Missouri to prove "that it has a compelling interest and that the contribution limits at issue are narrowly drawn to serve that interest." *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d 519, 520 (1998) (citations omitted). The Eighth Circuit thereby ignored the practice of this Court's entire campaign finance jurisprudence to subject limitations on contributions to less-than-strict scrutiny. See *Colorado Republican Fed. Campaign Comm.*, 518 U.S. at 635 (dissenting opinion) (Thomas, J.); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. at 259-60.

The rigor of the scrutiny accorded by the Eighth Circuit is evident from its insistence that the contribution limits could be upheld only if Missouri undertook to prove that legislators were actually being corrupted by contributions in excess of \$1,075, and that public perception of the corrupting influence of large campaign contributions was "objectively" reasonable. *Shrink Missouri Gov't PAC*, 161 F.3d at 522.

Only a level of review that was not merely strict but intentionally fatal could have led the panel to brush aside the considered judgment of both Houses of the Missouri legislature,

an extraordinary expression of concern by 74% of the state's electorate, the local expertise of the Federal District Court, and a sworn statement by the co-chair of the Interim Committee that recommended contribution ceilings. See *Shrink Missouri Gov't PAC v. Adams*, 5 F.Supp.2d 734, 737, 739, n.7 (E.D. Mo. 1998).

The standard of proof required by the panel majority would invariably doom legislation attempting to limit the size of campaign contributions. Proponents of such legislation are unlikely to be able to obtain the evidence that standard requires, when such proof often eludes prosecutors armed with full prosecutorial authority.

If the evidence and considerations canvassed above, persistent legislative efforts to address the appearance of corruption, and the widespread belief by Americans that their representatives are far more beholden to large monied interests than to voters generally, are insufficient (as the court below held) even to raise an issue of triable fact that concern with the potentially corrupting influence of campaign contributions in excess of \$1,075 was more than "illusory" within the meaning of *Buckley*, 424 U.S. at 27, then the promise of *Buckley* — that reasonable limitations on contributions may be upheld in the interests of combating the "inherent" risk of real and perceived corruption — will have been rendered sterile indeed.

Buckley itself noted the difficulty inherent in proving a *quid pro quo* relationship between large campaign contributions and particular political conduct that makes it necessary to place prophylactic limits on the size of campaign contributions in the first place. *Id.* at 26-27. But where this Court twenty-three years ago read that difficulty as reason *not* to stifle legislative reform, the Eighth Circuit turned that difficulty into a weapon to beat back campaign contribution ceilings, requiring Missouri to prove adjudicative facts demonstrating that Missouri politicians were actually being corrupted by large campaign

contributions before the state could prophylactically control the inherently corrupting influence of unlimited campaign contributions. Doing so is inconsistent with the less-than-strict review accorded other laws that do not directly, substantially, or in content-based ways trench on First Amendment interests. See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

The Eighth Circuit panel failed to find — and had no basis for finding — that Missouri's attempt to impose an inflation-adjusted ceiling of \$1,075 on contributions to candidates for statewide office would actually impinge on a contributor's legitimate First Amendment interests in "fueling" a candidate's ability to engage in robust and effective speech, or in "signaling" the contributor's intense level of support. It therefore erred when it applied strict scrutiny to invalidate a modest contribution ceiling limitation not different in kind from those upheld on lesser scrutiny in *Buckley*.

Indeed, although the burden was on the challengers, the record is clear that Missouri's \$1,075 ceiling on direct contributions does *not* materially impinge on a contributor's "fueling" interest, and that candidates for statewide office in Missouri are currently able to raise sufficient funds to conduct vigorous and robust campaigns, just as candidates for federal office throughout the nation are able to raise adequate funds to wage robust campaigns under an even more stringent contribution ceiling. Strict scrutiny was therefore wholly unwarranted.

III. MISSOURI'S CONTRIBUTION CEILINGS DO NOT UNDULY IMPINGE ON CONTRIBUTORS' LEGITIMATE FIRST AMENDMENT INTERESTS.

Measured against an appropriate standard of review, Missouri's decision to adopt the federal ceiling for statewide

office is fully justified. Missouri voters expressed overwhelming concern that large contributions were eroding confidence in the democratic process by establishing a climate of apparent corruption when they approved a statewide initiative placing even more stringent limits on campaign contributions. *Shrink Missouri Gov't PAC*, 161 F.3d at 520. Both Houses of the Missouri legislature carefully considered the issue, and determined that contribution ceilings were necessary to prevent the appearance or reality of corruption. Senator Goode, a 36-year veteran of Missouri politics, filed a sworn statement describing the deliberations of the Interim Committee of the Missouri legislature that recommended the contribution limits, and explaining why he believed them to be necessary. *Id.* Newspaper editorials throughout the state, both in the context of the voter initiative, and the legislative consideration of the issue, described incidents of apparent relationship between large contributions and political favors. *Shrink Missouri Gov't PAC*, 5 F.Supp.2d at 739, n.7. The federal district court judge, conversant with the reality of Missouri political life, believed that no reasonable person could disagree with the determination that contributions in excess of \$1,075 posed, at a minimum, a risk of the appearance of corruption. *Id.* at 739. For the panel majority to rule that such a record does not even pose a triable issue of fact concerning the relationship between contributions in excess of \$1,075, and the appearance or reality of corruption, is to substitute ideological disagreement with this Court's decision in *Buckley* for reasoned analysis.

There was no evidence that Missouri's contribution limitations undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens. They do not limit the amount *Shrink Missouri Government* or any of its members may jointly or severally independently expend in order to advocate political views. The Missouri limits, like the limits in *Buckley*, entail only a marginal, if any, restriction upon the contributor's ability to

engage in speech: they do not prevent anyone from spending as much as she wishes on her own speech.

So far as the interest in fueling candidates is concerned, a contribution ceiling leaves that interest unimpaired, absent proof that the limitation is so draconian as to prevent candidates from raising sufficient funds to spread their speech publicly. Campaign money is fungible, and a candidacy can be equally well fueled whether the funds come from one large contribution or a larger number of smaller ones. Indeed, under *Buckley*, if a candidate were to opt for public financing, the contributor's First Amendment interest in fueling would be fully satisfied, justifying a complete ban on private contributions. *Buckley*, 424 U.S. at 95, n.129.

Nor does the \$1,075 limit impinge on a contributor's ability to "signal" support, or particularly "intense" support, for a candidate. That interest is more than adequately served by the ability to make, and to be publicized as having made, a contribution to the maximum limit permitted. It can be further served, to whatever unlimited extent a contributor may desire, by the opportunity to make unlimited independent expenditures in support of the candidate.

No basis exists to subject Missouri's effort to limit the coercive use of campaign contributions to any level of heightened First Amendment scrutiny, much less the lethal version employed to invalidate Missouri's limits. Limiting the size of campaign contributions to \$1,075 minimizes the illegitimate coercive use of large contributions, while respecting a contributor's desire to "fuel" and "signal." Absent a showing that Missouri's ceilings prevent candidates from gathering the funds necessary for robust campaign advocacy, the fact that some members of the Eighth Circuit might have drawn the balance differently does not justify overturning the considered judgment of the people of Missouri that the inherent likelihood of corruption, the legislative perception of corruption, and the

popular belief in corruption in the electoral finance process warranted limiting the size of contributions to candidates for statewide office.

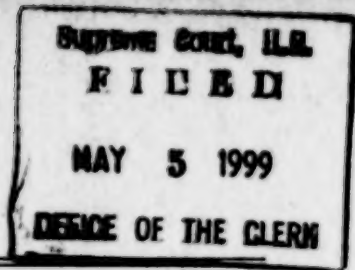
CONCLUSION

The judgment of the Eighth Circuit should be reversed.

Respectfully Submitted.

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(16)
No. 98-963



**In The
Supreme Court of the United States**

—◆—
JEREMIAH W. NIXON,
Missouri Attorney General,

Petitioner,

vs.

SHRINK MISSOURI GOVERNMENT PAC,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

—◆—
**BRIEF OF U.S. TERM LIMITS, INC.
AS AMICUS CURIAE IN SUPPORT
OF THE RESPONDENT**

—◆—
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QUESTION PRESENTED FOR REVIEW

Whether the State of Missouri may, without a rational basis, constitutionally impose inflexible contribution limits for candidates for various state offices without violating the First Amendment of the United States Constitution?

MOTION FOR LEAVE TO FILE AMICUS BRIEF

U.S. Term Limits, Inc. seeks leave of this Honorable Court to file an Amicus Curiae Brief in support of the Respondent, Shrink Missouri Government PAC, in the above-referenced matter.

U.S. Term Limits, Inc. is a national, non-profit organization that is an advocate of competitive elections. U.S. Term Limits has promoted and assisted in having term limits enacted for various state elected officials across the country. In light of its participation throughout the United States regarding term limit legislation, U. S. Term Limits believes it can provide this Honorable Court with a broad view regarding how campaign finance regulation only heightens the advantages that incumbent candidates, self-financed, and/or well-known and recognized candidates possess, thereby seriously impeding U.S. Term Limits' interest in achieving and maintaining competitive elections.

Consent of the parties to this action was not sought by Amicus Curiae.

Respectfully submitted:

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**BRIEF OF U.S. TERM LIMITS, INC. AS AMICUS
CURIAE IN SUPPORT OF THE RESPONDENT**

INTEREST OF AMICUS CURIAE

U.S. Term Limits, Inc. is a national, non-profit organization located in Washington D.C.¹ It is interested in competitive elections. Recognizing the power that incumbency has over the outcome of state and federal elections, U.S. Term Limits has been dedicated to promoting and enacting term limit legislation across the country. It has successfully assisted numerous grassroots organizations throughout the United States in enacting term limits for various state elected public officials, including governors and state legislators.

U.S. Term Limits has an interest in seeing that both state and federal elections become and remain competitive.² Currently, the advantages that incumbent candidates for state and federal public office have simply by virtue of being the incumbents seriously impede this effort. In short, so called "campaign finance reform" allows the incumbents to determine what is fair to the people who may challenge their incumbency. However, with the huge power of incumbency – to promote legislation favorable to groups, to help constituents through the labyrinth of problems created by government, to garner favorable news coverage for introducing the bill of the day – most elections are over even before they are begun.

The results of last November's elections demonstrate the effect that "incumbency" has on elections. The "privileges of membership," as the Washington Post referred to incumbency,

¹ Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in part or in whole, this Amicus Curiae Brief. Furthermore, no other entity or person, aside from Amicus Curiae, made any monetary contribution for the preparation and submission of this brief to this Honorable Court.

² Julia C. Wommack, Comment, *Congressional Reform: Can Term Limitations Close the Door on Political Careerism?*, 24 ST. MARY'S L.J. 1361, 1383 (1993) ("Term limitations are designed to restore competitiveness to the election process.").

allowed 93% of the incumbents to win re-election in the United States Senate and 98% of the incumbents to win in the United States House of Representatives.³ In an editorial in the Wall Street Journal, the paper wrote,

The root of the problem with Congress is that barring major scandal, it is almost impossible to defeat an incumbent. In the past three elections, 96% or more of House incumbents who ran won. Franking privileges, huge staffs, gerrymandering and unfair campaign finance laws have combined to give incumbents a grossly unfair advantage. One out of four House districts this year likely will have an incumbent running with no major-party opposition—up from one out of five in 1988. One-candidate races are now spreading to the Senate.⁴

If this Court reverses the Eighth Circuit Court of Appeals' decision in this case and upholds Missouri's limits, incumbents' advantages will be magnified. Campaign contribution limits serve incumbency. Indeed, any regulation or rule regarding campaign finance will serve a specific type of candidate and will predetermine the type of candidate who gets elected.

Every word written by this Honorable Court will be considered closely by the States to see what measures regarding campaign finance they may enact. The power of the states to enact legislation in the name of "campaign finance reform" significantly threatens the possibility of having competitive elections. U.S. Term Limits, Inc. seeks to protect against this threat.

³ *Facts and Figures of the 106th Congress*, WASH. POST, NOV. 5, 1998, at A39 <<http://www.washingtonpost.com/wp-srv/poli...paigns/keyraces98/stories/facts110598.htm>>.

⁴ 136 CONG. REC. S4644 (daily ed. April 19, 1990) (statement of Senator Humphrey urging his fellow Senators to endorse congressional term limits, incorporating the Wall Street Journal Editorial from April 18, 1990).

SUMMARY OF ARGUMENT

It is undeniable that campaign finance reform has captivated both Capital Hill and state legislatures. Not only the United States Congress, but state legislatures across the country have dealt with and are dealing with the perceived problems associated with campaign financing and corruption in federal and state elections by enacting or amending their campaign finance reform legislation.⁵

One of the primary rationales offered in support of campaign finance reform is that it is necessary to "level the playing field."⁶ Campaign finance reformers and their supporters argue that our democratic system of representation has

⁵ But see Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1056 (1996) ("The belief that modern campaigns have been corrupted by big money in some unprecedented manner simply does not square with historical fact.").

⁶ See 139 CONG. REC. H10667 (daily ed. Nov. 22, 1993) (statement of Rep. Barrett of Nebraska) ("I take exception to the claim that 'leveling the playing field' among candidates will occur with the bill."). See also Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 685-86 (1997) ("... a last argument would locate the key problem in current campaign finance practices in the advantage it confers on incumbents over challengers. Here the claim is that a healthy democracy depends on robust political competition and that campaign finance limits are needed to 'level the playing field.' "); Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1127 (1994) ("The present campaign finance system also has played a central role in shaping an electoral landscape that is grossly unfair to challengers."); Samuel M. Walker, Note, *Campaign Finance Reform in the 105th Congress: The Failure to Address Self-financed Candidates*, 27 HOFSTRA L. REV. 181, 187 (1998) ("[b]y passing a [bipartisan] bill that limits the effect of money in politics and levels the playing field between the challenger and incumbent, we can change the face of politics today.") (quoting Senator McCain from a press release on January 21, 1997); and Molly Peterson, Note, *Reexamining Compelling Interests and Radical State Campaign Finance Reforms: So Goes the Nation?*, 25 HASTINGS CONST. L.Q. 421, 445 (1998) ("Equality of opportunity to influence the political process, sometimes

been undermined by the increasingly higher amounts of money being contributed to and spent by our elected representatives. Given the current campaign finance system and the lack of competition in political races caused by that system, supporters of campaign finance reform claim that there is an "absence of accountability for elected officials that is a fundamental problem for our political system today."⁷

While this may be the perception of many state and federal legislators, allowing the State of Missouri or any state legislature to impose contribution limits or any other campaign finance restrictions will do nothing to solve the problem. It is impossible to think that incumbents will level the playing field between them and challengers. For instance, no legislature has voted to spend taxpayer dollars to raise the name recognition of a challenger to that of an incumbent at the beginning of an election to ensure a "level playing field." The necessary consequence of any campaign finance regulation is that this Court, other courts, Congress, and the state legislatures will predetermine what type of candidate will get elected. In general, campaign finance has merely helped incumbents stay in office. Any rule governing campaign finance necessarily gives a preference to certain particular candidates who decide to run for political office. For example, contribution limits favor those candidates running for political office who may be incumbents, wealthy individuals, or well-known/recognized individuals, and who already have a large pool of supporters from whom to accept contributions ("star" candidates). Because contributions are limited, it takes a large pool of contributors to amass the needed funds to run a campaign. For those individuals who are interested in running for political office but who may be unknown or without personal wealth, acquiring the necessary funds from a large

characterized as 'leveling,' should be recognized as a constitutionally compelling governmental interest.").

⁷ Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy*, 94 COLUM. L. REV. 1126, 1126-27 (1994).

enough pool of contributors may prove insurmountable. Therefore, by imposing contribution limits, this Court, Congress, and the state legislatures have already predetermined the type of candidate who gets elected.

Such finance restrictions are all the more problematic because such restrictions limit the political speech of citizens who may choose to run for state elected office. Some proponents of campaign finance reform are even advocating the imposition of spending limits, despite the fact that this Court struck down spending limits in *Buckley v. Valeo*⁸ as unconstitutional under the First Amendment of the United States Constitution.⁹ Elections need fewer, not more governmental restrictions.

⁸ 424 U.S. 1, 58-59 (1976) (per curiam) ("These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.").

⁹ See Campaign Finance Reform and Free Speech, 1997, 105th Congress, 1st Sess., *microformed on* CIS No. H521-57 (Congressional Info. Serv.) at 33 (Hearing before the House Judiciary Subcomm. on the Constitution) (statement by Representative Gephardt) ("I further believe that the dominance of money in politics debases the currency and destroys public confidence, and I believe that the only way to reduce the time spent on raising money and the dominance of special interests is to limit the amount of money that campaigns can spend. This is not a new idea."). See also *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998), *cert. denied sub nom. City of Cincinnati v. Kruse*, 119 S.Ct. 511 (1998) (Sixth Circuit Court of Appeals striking down the City of Cincinnati's ordinance imposing spending limits on city council candidates); *Shrink Missouri Government PAC v. Maupin*, 892 F.Supp. 1246 (E.D.Mo. 1995), *aff'd*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 2579 (1996) (Eighth Circuit Court of Appeals struck down Missouri's expenditure limits for political candidates). But see Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1059, 1060 (1996) who argues that spending less on campaigns may actually decrease the general public's awareness of and understanding of the issues. Bradley states, "... there is actually good cause to believe that we do not spend enough on campaigns."

U.S. Term Limits' Amicus Brief presents this Court with a legal and public policy perspective regarding the implications of a legal decision regarding the constitutionality of campaign finance reform. This Amicus Brief will show that any campaign finance regulation has the undeniable effect of limiting that very speech that this Court has ruled is at the "zenith" of First Amendment protection.¹⁰ Campaign finance regulations limit speech to those candidates who are incumbents, who are self-financed, or who are successful at fundraising from a \$1,000.00 donor.

Limits on the amount of contributions favors incumbents. Incumbent candidates enjoy natural advantages in fundraising simply by virtue of being the incumbent.¹¹ Challengers must counter these advantages. Simply enacting campaign finance reform will not level the playing field, and it will not result in more fair and competitive elections.

ARGUMENT

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION WEIGHS AGAINST THE ENACTMENT AND ENFORCEMENT OF REGULATIONS GOVERNING CAMPAIGN FINANCE.

I. Introduction

In the First Amendment of the United States Constitution, our Founding Fathers provided, in part, that "Congress shall make no law . . . abridging the freedom of speech . . ."

¹⁰ *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

¹¹ Other advantages that incumbent candidates enjoy include "name recognition, publicly paid staff, constituent services, free mailing privileges, and media access." See 139 CONG. REC. H10667 (daily ed. Nov. 22, 1993) (information included in the record during Rep. Livingston's comments). See also 136 CONG. REC. S2689 (daily ed. March 9, 1990) (statement of Sen. Dole) ("Incumbents already enjoy a number of tangible benefits not available to challengers – paid professional staff, the franking privilege, access to free media coverage – and they do not need yet another weapon in their arsenal against challengers.").

The protection afforded by the First Amendment restricts the States from unnecessarily inhibiting individuals' free speech. In *Thornhill v. Alabama*, this Court stated, "The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."¹²

The speech involved in this case is undeniably political speech. Persons running for public office in state and federal elections and their supporters and opponents are engaging in political speech. Indeed, this Court stated in *Buckley v. Valeo* that "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."¹³ Furthermore, this Court recognized that the "First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"¹⁴ Moreover, this Court determined that the First Amendment guarantee "has its fullest and most urgent application precisely to the conduct of campaigns for political office."¹⁵ Advocates of campaign finance reform circumvent this Court's precedent regarding the status of political speech in the United States by alleging corruption or at least the appearance of corruption. Appearance of corruption is a popular canard. It is an allegation impossible to prove or disprove. Virtually no proof has ever been advanced by any legislative body showing corruption before "campaign finance reform." Certainly, no proof was made of the corruption eliminated by campaign finance. In short, no evidence justifies restrictions on speech that has a history of being protected under the most

¹² 310 U.S. 88, 95 (1940).

¹³ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam).

¹⁴ *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

¹⁵ *Id.* at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

exacting scrutiny.¹⁶ Proponents of campaign finance reform also argue that such reform is necessary in order to "level the playing field." That argument, however, was rejected by this Court in *Buckley v. Valeo*.

While the primary governmental interest offered in support of the Federal Election Campaign Act was prevention of corruption or the appearance of corruption, another "ancillary" interest offered in support of the expenditure limitations was that such limits would "equal[ize] the relative financial resources of candidates competing for elective office, . . ."¹⁷ This Court responded, however, by stating that "That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights."¹⁸ Indeed, this Court stated that " . . . [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, . . ."¹⁹ This Court recognized that limitations on a candidate's expenditures may not necessarily equalize the financial resources available to competing candidates. It pointed out that just because a candidate may spend less of his/her own money on their campaign, that candidate

¹⁶ *Id.* at 44-45 (" . . . whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."). See also *Buckley v. American Constitutional Law Foundation*, ___ U.S. ___, 119 S.Ct. 636, 649 (1999) (Thomas, J., concurring) ("When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling governmental interest.") (cites omitted); and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.").

¹⁷ *Buckley v. Valeo*, 424 U.S. at 53, 54.

¹⁸ *Id.* at 54.

¹⁹ *Id.* at 48-49.

may still outspend any challenger through better fundraising.²⁰ Or, as this Court acknowledged, a candidate's own personal wealth may inhibit his/her attempts to attract contributions or volunteers in order to have an effective campaign.²¹

As these statements in this Court's decision in *Buckley v. Valeo* demonstrate, campaign financial restrictions necessarily act to the detriment of particular classes of candidates, and they determine the type of candidate who gets elected. Such rules should be strictly scrutinized by this Court.

Any attempts to regulate campaign finance reform unnecessarily inhibit the freedom of speech protected by the First Amendment and upheld by this Court. Moreover, any campaign finance regulations act to the detriment of the persons for whom reformers are supposedly advocating – the challengers and voters. Whether a state or federal government imposes expenditure and/or contribution limits, these restrictions violate an individual's political speech, speech that is at the core of the First Amendment.

²⁰ *Id.*

²¹ *Id.* Examples of how a candidate's personal wealth can work to his/her detriment include Ross Perot, Michael Huffington, Al Checchi, and Jane Harman, a representative from California. Checchi and Harman were both candidates for California's governorship in this past June's primary election, and both spent a considerable amount of their own personal money to run their campaign bids. However, both candidates lost. Checchi spent \$40 million dollars and Harman spent \$16 million dollars. See Philip J. Trounstein, *Experience worth more than cash this time around*, SAN JOSE MERCURY NEWS, (June 3, 1998), <<http://www.mercurycenter.com/local/center/lesson060498.htm>>. See also Janet Hook, *DECISION '98 Big Spenders Can Be Losers in Campaigns Despite Wealth, Checchi, Harman, Issa and others Come Up Short in Political Wars*, LOS ANGELES TIMES, June 5, 1998, at A1, available in 1998 WL 243220. ("To be sure, vast personal wealth can give a candidate a leg up on little-known challengers who lack the fund-raising clout of incumbents, analysts said. But ready cash is not necessarily enough to get them across the finish line. And in some cases, voter backlash can turn a candidate's personal assets into a political liability.").

Any suggestion that government can inhibit such speech without providing real evidence or proof to suggest that restrictions are necessary and are the least restrictive means to such ends clearly violates this Country's and this Court's tradition of promoting a free marketplace of ideas with which to unveil truths. In *Abrams v. United States*,²² Justice Holmes, in his dissenting opinion, established a metaphor which has dominated this Court's jurisprudence ever since. Justice Holmes stated,

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.²³

²² 250 U.S. 616 (1919).

²³ *Id.* at 630 (Holmes, J., dissenting). See also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. '[T]he freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole.'") (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-504 (1984)); *Consolidated Edison Company of New York, Inc. v. Public Service Comm'n of New York*, 447 U.S. 530, 534 (1980) ("Freedom of speech is 'indispensable to the discovery and spread of political truth,' (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), and 'the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ' (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The First and Fourteenth Amendments remove 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom

More recently, this Court explained that "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."²⁴ Yet, in the campaigns that will determine who will govern, such competition is stifled. It is stifled first by the sheer power of incumbency and then destroyed by so called "campaign finance."

II. Regulating Campaign Contributions and Expenditures Will NOT Level the Playing Field.

Advocates of campaign finance reform offer, as one reason for such reform, that regulation of campaign finance is necessary to create a level playing field on which candidates may compete equally for elected office.²⁵ Yet, campaign finance reforms have the opposite effect. Such reforms actually serve to predetermine who will get elected, and they further magnify the advantages that incumbent candidates possess regardless of their political abilities.

will ultimately produce a more capable citizenry and more perfect polity . . . ' " (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

²⁴ *William v. Rhodes*, 393 U.S. 23, 32 (1968).

²⁵ See e.g., 139 CONG. REC. H10667 (daily ed. Nov. 22, 1993) (statement of Rep. Livingston incorporating information that was made a part of the record) ("The fundamental goal is to level the financial playing field so that challengers are able to mount serious campaigns against incumbents who, an individual's political record aside, enjoy the considerable current advantages of incumbency."); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 685-86 (1997) ("Here the claim is that a healthy democracy depends on robust political competition and that campaign finance limits are needed to 'level the playing field.' The reformers contend that unfettered political money confers an anticompetitive advantage upon incumbents."); and Molly Peterson, Note, *Reexamining Compelling Interests and Radical State Campaign Finance Reforms: So Goes the Nation?*, 25 HASTINGS CONST. L.Q. 421, 445 (1998) ("Equality of opportunity to influence the political process, sometimes characterized as 'leveling,' should be recognized as a constitutionally compelling governmental interest.").

Another justification for such reform, and the one offered by the Petitioner in this case, is that such reform is essential to combating corruption and the appearance of corruption. Yet, campaign finance regulations have virtually no effect on "leveling" the playing field in which candidates compete or eliminating corruption or the appearance of corruption in the political process. Such legislation has the inevitable consequence of harming citizen debate. The campaign finance legislation that is currently being enforced by both Federal and State governments has failed in its attempts to achieve the primary stated purposes of campaign finance reform.

Any reform first inures to the benefit of incumbents who are well connected with lobbyists and other special interests. In addition, the finance reforms that this Court has upheld also benefit self-financed candidates or "famous" individuals who decide to run for office and can rely on their name recognition or personal wealth to accumulate the necessary contributions to run a campaign.

Limiting the size of contributions does not limit the power of incumbency. While most of the calls for campaign finance reform involve reform in the federal system of elections, the arguments made by proponents and opponents of campaign finance reform are equally applicable to state elections, just on a smaller scale.

On February 27, 1997, the United States House of Representative's Subcommittee on the Constitution, Committee on the Judiciary, met and held hearings on free speech and campaign finance reform. Chairman of the Subcommittee, Representative Canady, explained that the purpose of this hearing was "to present testimony regarding the relevant framework of constitutional law which is now in place."²⁶ One of the individuals testifying was Ira Glasser, the Executive Director of the American Civil Liberties Union. His

²⁶ See *Campaign Finance Reform and Free Speech*, 1997, 105th Congress, 1st Sess., microformed on CIS No. H521-57 (Congressional Info. Serv.) at 1 (Hearing Before the House Judiciary Subcommittee on the Constitution).

statements clearly demonstrate the fallacy behind the purposes sought to be served by campaign finance laws that restrict individuals' free speech, including the campaign contributions which Petitioners seek to impose in Missouri.

Mr. Glasser explained that by upholding contribution limits while striking down expenditure limits, a wealthy candidate like Ross Perot could spend whatever amount he wanted on his candidacy. Yet, if another wealthy individual wanted to support Perot's opponent, under the campaign finance laws, that individual could not. Thus, "Perot is able to spend whatever he wants to run for office but if an equally wealthy donor wants to enable Colin Powell to run against Perot, he commits a crime."²⁷ Similarly, under this Court's decision in *Buckley v. Valeo*, Perot may spend whatever amount of his own money he wants to if he is running for office. Yet, Perot is prohibited from using that same amount of money to support another well-qualified candidate's campaign.

Contribution limits seriously impair a challenger's ability to have a successful campaign.²⁸ As the few simple examples above suggest, campaign finance regulations necessarily predetermine the type of individuals who will be able to run for office and eventually get elected. This consequence of campaign finance regulations must be closely scrutinized by this Court in order to avoid condoning preferential treatment for candidates who are incumbents or who are independently wealthy, and who are therefore capable of financing their own campaign.²⁹

²⁷ See *id.* at 51 (statement of Ira Glasser).

²⁸ Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1073 (1996).

²⁹ In *Bullock v. Carter*, 405 U.S. 134 (1972), this Court determined the constitutionality of a Texas statute that required a candidate to pay a filing fee before being allowed to participate in the state's primary election. *Id.* at 137. The issue was whether this unconstitutionally discriminated against the candidates who could not pay and the voters who supported

In *U.S. Term Limits, Inc. v. Thornton*,³⁰ this Court considered the constitutionality of an amendment to Arkansas' Constitution that precluded candidates who had served a particular amount of time in either the United States House or Senate from running again for that same office. This Court upheld the Arkansas Supreme Court's decision finding the term limit amendment to be unconstitutional under the Qualifications Clause of the United States Constitution.³¹ This Court held that **"a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly."**³² (emphasis added). While Amicus Curiae does not argue here that these campaign finance regulations should be challenged under the Qualifications Clauses of the United States Constitution,³³ Amicus Curiae thinks it is self-evident that campaign finance regulations undeniably have the effect of "handicapping" classes of candidates who are not incumbents, who are not personally wealthy, or who may lack name recognition.

Although candidacy is not a fundamental right, this Court acknowledged that its ballot access cases focus on the degree

them. *Id.* at 141. This Court applied strict scrutiny to invalidate the filing fee requirement noting that the members of the less affluent segment of society whose candidates were unable to pay the filing fee would bear more of the burden of this requirement. This Court stated, "... it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons who they favor." *Id.* at 144.

³⁰ 514 U.S. 779 (1995).

³¹ *Id.* at 783, 837-38.

³² *Id.* at 836.

³³ See *id.* at 925 (Thomas, J., dissenting) ("To analyze such laws under the Qualifications Clauses may open up whole new vistas for courts. If it is true that 'the current congressional campaign finance system . . . has created an electoral system so stacked against challengers that in many elections voters have no real choices,' (cite omitted), are the Federal Election Campaign Act Amendments of 1974 unconstitutional under (of all things) the Qualifications Clauses?").

to which a challenged restriction inhibits certain classes of candidates from getting on the ballot. This Court stated, "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" ³⁴ Two instances involving ballot cases in which this Court did not follow traditional equal protection principles involved classifications based on wealth and classifications that burdened new or small political parties or independent candidates.³⁵

Regarding classifications based on wealth, this Court stated, "we have departed from traditional equal protection analysis [in analyzing such cases] because such a 'system falls with unequal weight on voters, as well as candidates, according to their economic status.' (cite omitted). 'Whatever may be the political mood at any given time, our tradition has been one of hospitality toward all candidates without regard to their economic status.'" ³⁶ Contrary to these expressed sentiments, however, campaign finance regulations clearly inure to the benefit of particular classes of candidates. These classes include self-financed, independently wealthy candidates and incumbents who, by virtue of their incumbency, have created a campaign "war chest" and who have established a vast network of campaign contributors. Candidates of more modest means are burdened by the campaign rules because they cannot finance their campaign themselves. They must rely on a larger number of contributors who make smaller contributions because of the contribution limits; rather than needing to rely on only a handful of contributors who would be willing to make very large contributions but are unable to do so legally.

With respect to the line of ballot access cases regarding classifications that burden small or new political parties or independent candidates, this Court conceded that it has

³⁴ *Clements v. Fashing*, 457 U.S. 957, 964 (1982) (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)).

³⁵ *Id.* at 964.

³⁶ *Id.* (quoting *Lubin v. Panish*, 415 U.S. 709, 717-18 (1974)).

upheld state restrictions to the ballot that require political parties and their candidates to demonstrate a certain level of support before they may be placed on the ballot.³⁷ However, in upholding one of the Texas constitutional amendments in *Clements v. Fashing*, this Court distinguished it from the filing fee or level of support requirements stating “§ 19 in no way burdens access to the political process by those who are outside the ‘mainstream’ of political life.”³⁸ Unlike § 19 of the Texas Constitution which this Court upheld in *Clements v. Fashing*, campaign finance regulations clearly burden access to the political process by those candidates who are indeed “outside the mainstream of political life.” Such individuals include third-party candidates, non-incumbent candidates of modest wealth, first-time challengers who lack name recognition and who may also be of limited financial means.

Campaign finance regulations predetermine who will be successful in an election, and they preclude individuals who fall outside of those predetermined classes from participating equally in the political process. Such regulation certainly requires closer scrutiny to determine the validity of such regulations rather than the traditional rational review that is generally applied by this Court to most legislatively created classifications.

Campaign finance reform also fails as a “leveling” device with respect to limits on types of contributions. Under the federal campaign finance laws, the limits on contributions apply only to “cash” contributions. The result is that an owner of a newspaper could and some owners do use their newspapers to campaign for candidates. However, a wealthy individual who does not own a newspaper, but who wishes to give the challenger money in order to run an advertisement on behalf of the challenger’s own campaign, is precluded from making the contribution because the campaign finance laws preclude that wealthy individual from making such an expensive contribution. The result is that “one candidate gets an

³⁷ *Id.* at 965.

³⁸ *Clements v. Fashing*, 457 U.S. at 967.

entire newspaper’s support every day, while the other is denied even one page once during the campaign.”³⁹

Another example of this unlevel playing field is the “franking” privilege that incumbents enjoy by virtue of being incumbents. Incumbents may mail information to their constituencies free of charge to themselves, but at a cost to the taxpayers. This money is not considered a campaign expense or contribution by the taxpayers. Yet, if a challenger receives a contribution large enough to cover the cost of similar mailings, the contribution would be illegal. Finally, while incumbent candidates have the ability to make “news” and thereby get additional television or newspaper coverage for themselves, a challenger who wants to buy space to respond to the incumbent candidate cannot receive a contribution to cover the expense without violating the campaign finance laws.⁴⁰

As these vivid examples demonstrate, limiting the amount of money that may be spent or contributed to a candidate’s campaign fails to serve the purported interest of “leveling the playing field.” Rather, campaign finance regulations that impose limits on the amount of contributions and/or expenditures magnify the inequality that campaign finance reformers claim to want to ameliorate. In the process, the First Amendment’s protection of core political speech is undermined.

³⁹ See *Campaign Finance Reform and Free Speech*, 1997, 105th Congress, 1st Sess., microformed on CIS H521-57 at 51 (Congressional Info. Serv.) (Hearing Before the House Judiciary Subcommittee on the Constitution) (statement of Ira Glasser).

⁴⁰ *Id.* See also Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1079 (1996) (“Restricting the flow of money into campaigns also increases the relative importance of in-kind contributions and so favors those who are able to control large blocks of human resources. Limiting contributions and expenditures does not particularly democratize the process, but merely shifts power from those whose primary contributions is money to those whose primary contribution is time, organization, or some other resource . . .”).

Campaign contribution limits, like the Missouri law involved in this case, increase, rather than decrease, the inequality that exists between incumbents and challengers and demonstrate a preference that the campaign finance laws have for incumbents and wealthy individuals who want to run for political office. "Quite apart from differential impact on challengers and incumbents, campaign spending limits might adversely affect Republicans more than Democrats, or third-party candidacies more than major party candidacies, or business-oriented candidates more than environmentalist candidates."⁴¹ Again, any regulation this Court allows will determine the type of candidate who will successfully run for political office. Since speech is supposed to work in a marketplace, this Court should let the marketplace decide how much and what type of campaign speech it wants.

Mr. Glasser of the ACLU has explained that while an incumbent has considerable exposure via being the incumbent, a challenger must try to overcome this incumbent advantage "only by outspending the incumbent."⁴² However, contribution limits inhibit a challenger's attempts. In addition, because of this Court's opinion in *Buckley v. Valeo*, a candidate is legally prohibited from accepting contributions that exceed \$1,000 under the Federal Election Campaign Act, and that exceed \$1,075.00, \$525.00, and \$275.00 for various offices under Missouri's campaign finance law.⁴³

Other commentators have drawn the same conclusions. James Bopp, Jr., an attorney whose law firm has a major area of practice involving Federal and State election laws, also

⁴¹ Vincent Blasi, *Free Speech and the Widening Gyre of Fund-raising: Why Campaign Spending Limits may not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1292 (1994)

⁴² See *Campaign Finance Reform and Free Speech*, 1997, 105th Congress, 1st Sess., microformed on CIS H521-57 at 52 (Congressional Info. Serv.) (Hearing Before the House Judiciary Subcommittee on the Constitution) (statement of Ira Glasser) (emphasis supplied).

⁴³ See Mo. Ann. St. Sec. 130.032 (West Supp. 1998).

testified before the House Judiciary Subcommittee on the Constitution. He stated,

[L]imiting money will not level the playing field; it will simply advantage certain people over others. Those that need to raise the money the most to participate in issue advocacy in our society are citizens' groups and individuals. It is not the press. It is not the movie stars and athletes. It's not the Washington consultants. It's not the political insiders. It's not incumbent Members of Congress. It's not the wealthy. It is those that are of modest means that want to join their money together to multiply their voice. So if you take money out of the process, what you are taking out of the process is the voice of everyday citizens to participate in the political process, advantaging those that have these other assets that can command public attention.⁴⁴

⁴⁴ *Campaign Finance Reform and Free Speech*, 1997, 105th Congress, 1st Sess., microformed on CIS H521-57 at 57 (Congressional Info. Serv.) (Hearing Before the House Judiciary Subcommittee on the Constitution) (statement of James Bopp, Jr.). See also Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 321-23 (1998) ("First, it is a mistake to think that contribution and spending limits simply inhibit the speech of the rich. They do not merely inhibit such candidates as Ross Perot or Michael Huffington from spending large sums of personal wealth, but also inhibit individuals and groups who are good at fund raising, regardless of personal wealth, from spending the money they are able to raise . . . Second, it is a mistake to think that spending and contribution limits will meaningfully diminish the voice of the rich and powerful, for those limits cannot begin to cover their alternative outlets" such as issue advocacy or control of the mass media.); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 686 (1997) ("Campaign finance limits themselves may help to entrench incumbents in office. Incumbency confers enormous advantages: . . . To offset these advantages, challengers must amass substantial funds. Challengers' lack of prominence may make it more difficult for them to raise funds from large numbers of small donations. They may therefore depend more than incumbents on concentrated aid from parties, ideologically sympathetic PACs, or even wealthy individual

Similarly, Justice Scalia, in his dissenting opinion in *Austin v. Michigan Chamber of Commerce*,⁴⁵ questioned the Michigan state legislature's sincerity in its interest of "equalizing" political debate by restricting corporations from expressing their points of view.⁴⁶ Justice Scalia explained that although the Michigan legislature may have had a "noble" objective of equalizing debate in the political arena by preventing corporations from having a disproportionate voice in that arena, under our Constitution, specifically our Bill of Rights,

there are some things – even some seemingly *desirable* things – that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure 'fair' political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. Perhaps the Michigan Legislature was genuinely trying to assure a 'balanced' presentation of political views; on the other hand, perhaps it was trying to give unincorporated unions (a not unsubstantial force in Michigan) political advantage over major employers. Or perhaps it was trying to assure a 'balanced' presentation because it knows that with

private backers. Of course, once again, contribution limits under the split regime of Buckley exacerbate the problem, as incumbents are more likely to be able to raise a large number of capped contributions than challengers can."); and Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1402 (1994) ("The risk of incumbent self-dealing becomes even more troublesome in light of the fact that dissidents or challengers may be able to overcome the advantages of incumbency only by amassing enormous sums of money, either from their own pockets or from numerous or wealthy supporters . . . Campaign finance limits threaten to eliminate one of the few means by which incumbents can be seriously challenged.").

⁴⁵ 494 U.S. 652 (1990).

⁴⁶ *Id.* at 692 (Scalia, J., dissenting).

evenly balanced speech incumbent officeholders generally win. The fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech 'for fairness sake' simply out of bounds.⁴⁷

On the other side of the argument are proponents of campaign finance reform that, while recognizing that incumbents enjoy many advantages over their challengers, advocate spending and contribution limits supplemented by public campaign financing. They argue that what is, at stake in campaign finance reform is "the **fairness of the electoral process itself** and the ability of citizens to hold their elected representatives accountable."⁴⁸ However, incumbents – our elected officials – will not "equalize" the playing field between themselves and challengers. They never will. In an editorial article, a writer wrote,

The March 9 guest column 'Case for Campaign Spending Limits,' is of scant value; it deals with only one aspect of the advantages of incumbency. The franking privilege and allowances for staffing and expenses are of equal importance . . . Because they're so big, unless the other financial benefits of incumbency are considered, changing campaign spending limits at best will have little effect; at worst, it misleads the public into thinking there's a level playing field for incumbent and challenger and that a continued incumbent re-election rate of over 95 percent is the natural state of affairs.⁴⁹

⁴⁷ *Id.* at 692-93 (Scalia, J., dissenting).

⁴⁸ Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1136 (1994) (emphasis added).

⁴⁹ See e.g., *Perspective*, CHI. TRIB., April 2, 1993, at 22, available in LEXIS, News Library, Mags, Majpap, Papers File.

Proponents of campaign finance reform report that the gap is widening between what financial resources are available to incumbents versus what is available to challengers.⁵⁰ They have advocated imposing spending limits on congressional campaigns arguing that "because the congressional campaign finance system so favors incumbents, challengers, regardless of party affiliation, are all but locked out of the competition."⁵¹ Some advocates of reform argue that it is the unlimited spending that is presently allowed in elections "that is the ultimate protection scheme for incumbents."⁵²

Supporters of campaign reform point to figures showing that in the 1992 elections, United States House of Representative incumbents spent almost four times more than the challengers and had more than \$248 million in total available campaign funds compared to the \$49 million that challengers had. In the United States Senate, the "average incumbent" spent approximately \$4.2 million while the "average challenger" spent approximately \$1.7 million. In 27 of 28 Senate races, the incumbent candidate outspent the challenger, and only four of the incumbents lost.⁵³

Larry Makinson, Executive Director of the Center for Responsive Politics, a nonprofit research organization, has explained that money has become "an instrument of political power." As a result of this, only about 20% of congressional incumbents in this past year's congressional elections had

⁵⁰ Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. at 1133.

⁵¹ *Id.* at 1136.

⁵² *Id.* at 1152.

⁵³ *Id.* at 1134-35. In 1998, the re-election percentage of incumbents in the United States House of Representatives and United States Senate was 98% and 93%, respectively. See *Facts and Figures of the 106th Congress*, WASH. POST, Thurs., Nov. 5, 1998 at A39, <<http://www.washingtonpost.com/wp-srv/poli...paigns/keyraces98/stories/facts110598.htm>>.

serious opponents thus making them perhaps the least competitive elections in memory. Makinson attributes this to the fact that the would-be challengers do not have the resources to compete. Based on reports filed with the Federal Election Commission, almost 180 House incumbents' challengers had virtually no financial support, and in almost two-thirds of the House districts, incumbents had a fund-raising advantage of 10 to 1 or more compared to their opponents.⁵⁴ Studies trying to determine the effect that campaign spending has on votes have shown that money benefits the challenger rather than the incumbent. Therefore, spending limits on campaigns would actually harm, rather than help challengers.⁵⁵ This is clearly contrary to at least one of the aims to be achieved by the advocates of campaign finance reform – "leveling the playing field" and making elections more competitive.

Advocates of campaign finance reform are pushing for limiting the amount of money that is spent on campaigns

⁵⁴ See James A. Duffy, *Special Interests Pour Money into Incumbents' Campaigns*, SEATTLE TIMES, Tues., October 20, 1998, <http://www.seattletimes.com/news/nation-world/html98/altfund_102098.html>. Despite these statistics, not spending as much money as your opponents does not mean automatic loss. In the 1998 Democratic primary for California Governor, among the candidates included Al Checchi who spent \$40 million of his own money and State Representative Jane Harman who spent \$15 million of her husband's money. Despite spending only a fraction of what his opponents spent, however, Lieutenant Governor, Gray Davis, won. In addition, in the California Republican Primary for U.S. Senate, the California State Treasurer, Matt Fong, won despite his challenger outspending him 4 to 1. See *Money Isn't Everything*, SAVANNAH MORNING NEWS ELECTRONIC EDITION, Top Stories Opinion, June 5, 1998, <<http://www.savannahmorningnews.com/stories.060598/opioedtwo.html>>. Note, however, that in both of these cases, the candidate who won was an incumbent in a different political office. Thus, again, even if there were spending and/or contribution limits, incumbents are still holding advantages over their challengers, even challengers who outspend them.

⁵⁵ *Money Isn't Everything*, SAVANNAH MORNING NEWS ELECTRONIC EDITION, June 5, 1998 (based on comments made by Bradley Smith of the Cato Institute).

under the guise that such limits will increase the competitiveness of elections and level the playing field in elections. However, these same reformers fail to address how spending and contribution limits will offset the other advantages that incumbent candidates have.⁵⁶ Former president of Common Cause, Fred Wertheimer, and the Vice-President of Issue Development of Common Cause, rely on "campaign scholars" David Magleby and Candice Nelson, to provide additional support for their call to impose spending limits and provide public financing of campaigns.

In their book, *The Money Chase: Congressional Campaign Finance Reform*, Magleby and Nelson state:

Under a system of public financing with spending limitations, few incumbents would go unchallenged, and challengers' campaigns would be on a more even financial footing with incumbents. **Although incumbents would retain many of the other advantages of incumbency, sufficiently high spending limits coupled with public financing would make challengers more competitive.**⁵⁷

While admitting that incumbents have financial advantages, nowhere do these reformers of campaign finance explain how such advantages that incumbents enjoy can be addressed by simply limiting the amount of money that is spent on a campaign.

The only means by which non-incumbent challengers have any real chance to win a seat occupied by an incumbent

⁵⁶ Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1065 (1996) ("In the 1994 U.S. House elections, for example, many incumbents won while spending considerably less than their opponents . . . Given the inherent advantages of incumbency, this is powerful evidence that a monetary advantage alone does not mean electoral success.").

⁵⁷ Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. at 1153 (quoting David B. Magleby and Candice J. Nelson, *The Money Chase: Congressional Campaign Finance Reform* 164 (1990)) (emphasis added).

is through spending money, either their own or that of contributors, trying to get their message across to voters. By eliminating this option, challengers have no hope of presenting any serious challenge to incumbents who already enjoy name recognition, visibility, paid staff, mailing privileges, and other advantages. How could a challenger compete against an incumbent who has all of these other advantages without spending money? By imposing campaign spending and contribution limits, reformers of campaign finance will stack the deck against the very interests they seek to promote – increasing electoral competitiveness and eliminating corruption or the appearance of corruption.

Limited contributions are followed by an overall decrease in spending since a candidate relies on contributions to fund his/her campaign.⁵⁸ This is particularly true if the candidate has fewer personal funds available to spend. An overall decrease in campaign spending handicaps challengers because, as discussed above, incumbents already enjoy other advantages that come with being the incumbent.

In his article, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, Bradley A. Smith explains that in the few studies conducted regarding the effect of campaign spending on votes, the result has been that additional spending by a candidate after he/she has already spent the minimum amount necessary to reach the public, affects only a limited number of votes.⁵⁹ However, Smith explains that any positive consequence of additional spending benefits challengers more than incumbents because results of studies show that an incumbent's added spending typically means that the incumbent's campaign is having problems and

⁵⁸ Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1073 (1996).

⁵⁹ *Id.* at 1074. In his article, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 COLUM. L. REV. 1281, 1294-95 n.48 (1994), Vincent Blasi notes that the study upon which Bradley A. Smith relies has been challenged.

that the incumbent is being challenged by another well-financed candidate. Bradley concludes, "Because an incumbent's added spending is likely to have less of an effect on vote totals than the additional spending of a challenger, limits on total campaign spending will hurt challengers more than incumbents."⁶⁰

Contribution limits, such as those enacted by the State of Missouri and struck down by the Eighth Circuit Court of Appeals, have a tendency of favoring incumbent candidates over the challengers. The lower the contribution limit is set, the more difficult it is for a candidate to acquire money from a small group of avid supporters. The result is that a candidate must rely on large groups of supporters who must make smaller contributions. This consequence inures to the benefits of incumbents who have already established a vast network of dependable contributors, who have an established campaign system, and who can collect funds from PACS with whom the incumbent has established a relationship. Other persons who benefit from contribution limits include candidates who are wealthy or who have name recognition. These individuals may rely on their financial resources or on their name recognition. Challengers who are harmed by contribution limits include individuals who lack the name recognition and the ability to raise enough funds from a large group that is making smaller contributions.⁶¹ Therefore, any regulation of campaign finance predetermines what type of candidate will get elected. Such a result demands that close scrutiny be used to examine the constitutionality of any such regulation.

Petitioners and other like-minded reformers who advocate the imposition of limits on campaign contributions as a means of reducing corruption or the appearance of corruption are actually perpetuating the problem they seek to eliminate. In addition, a lack of campaign limits will have no effect on politicians. The red herrings of "corruption" and "appearance

⁶⁰ Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. at 1074.

⁶¹ *Id.* at 1073.

of corruption" can easily be sniffed out. Candidates themselves, as well as the press, can expose how a candidate is being financed. Voters can then vote based upon that financing. Voters can readily choose whether to vote for a candidate with many or few contributors. An "appearance" of corruption is likely to take a toll at the ballot box.

Contribution limits will **not** eliminate corruption or the appearance of corruption in the electoral process because such limitations merely increase the desire of contributors to seek to influence legislators rather than elect like-minded legislators.⁶² This is because campaign contributors such as PACs and other monied special interests will not "waste" their financial resources on challengers. Given the very high reelection of incumbents, contributing money to a challenger would be "counterproductive."⁶³ By limiting how much an individual may contribute to a campaign, the contribution is likely to have minimal effect on increasing the odds of a challenger's victory over an incumbent. Therefore, the best alternative is for contributors to donate to incumbents with the hope of minimizing any negative consequences towards the contributors' interests.⁶⁴ Thus, campaign contributions do not serve the interests of the Petitioners by reducing the corruption or appearance of corruption in the electoral process. Instead, contributions look to influence the pre-determined winners – incumbents. Furthermore, campaign regulations ensure that a predetermined class of candidates

⁶² *Id.* at 1075.

⁶³ *Id.* See also Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy*, 94 COLUM. L. REV. 1126, 1135 (1994) ("For most PACs, contributions to challengers is seen as a waste of money. Moreover, few PACs are willing to run the risk of antagonizing an incumbent Member of Congress by contributing to his or her opponent. The contribution patterns of PACs strongly reflect this preference for incumbents.").

⁶⁴ Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. at 1075-76.

are elected, and re-elected – incumbents and wealthy individuals who run for office.

CONCLUSION

Campaign finance reform, while sounding lofty, is really a prescription for further entrenching incumbent candidates in office and confining the type of candidate who will be elected. First-time challengers, persons of modest wealth, third-party candidates, and independent candidates are all seriously disadvantaged by campaign finance regulations.

The alleged goals of advocates of campaign finance reform are not achieved by regulations. As this Amicus Brief has demonstrated, campaign contribution and expenditure limits inure to the benefit of incumbents and show a preference for incumbents, media stars, and wealthy candidates. Campaign finance regulations do not rectify the problems asserted to be served by such regulations, but instead, perpetuate the problems.

Any regulation of campaign finance that restricts the amount of money that may either be spent or contributed restricts core political speech. The best corrective is more speech, not less. Limiting speech is contrary to the First Amendment's protection of political speech. In *Buckley v. Valeo*, this Court reiterated that the First Amendment "was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"⁶⁵

Instead of restricting the amount of money that may be contributed or expended in a campaign, there should be no regulation of political speech. The result of this non-regulation under the First Amendment allows for Justice Holmes'

⁶⁵ 424 U.S. 1, 49 (1976) (per curiam) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)) (internal quotes omitted).

"competition in the market" to freely function. As one author explained,

By assuring freedom of speech and of the press, the First Amendment allows for exposure of government corruption and improper favors and provides voters with information on sources of financial support. There is no shortage of newspaper articles reporting on candidate spending and campaign contributions, and candidates frequently make such information an issue in campaigns. By keeping the government out of the electoral arena, the First Amendment allows for a full interplay of political ideas and prohibits the type of incumbent self-dealing that has so vexed the reform movement. It allows challengers to raise the funds necessary for a successful campaign and keeps channels of political change open. By prohibiting excessive regulation of political speech and the political process, the First Amendment, properly interpreted, frees individuals wishing to engage in political discourse from the regulation that now restrains grassroots political activity. And because the First Amendment, properly applied to protect contributions and spending, makes no distinctions between the power bases of different political actors, it helps to keep any particular faction or interest from permanently gaining the upper hand. In each respect, it promotes true political equality.⁶⁶

Any rule of law this Honorable Court makes will determine the type of candidate who gets elected. Predetermined classification based on campaign finance regulations should be and must be closely scrutinized. Missouri's campaign

⁶⁶ Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L. J. at 1090.

finance regulation does not survive strict scrutiny. The Eighth Circuit's decision should be affirmed.

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JUN 4 1999

In The
Supreme Court of the United States CLERK

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and ELAINE SPIELBUSCH,
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ROBERT P. MCCULLOCH,
St. Louis County Prosecuting Attorney,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC;
ZEV DAVID FREDMAND; JOAN BRAY,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF JAMES MADISON CENTER FOR FREE SPEECH
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS
SHRINK MISSOURI GOVERNMENT PAC
and ZEV DAVID FREDMAND
SUGGESTING AFFIRMANCE

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INTEREST OF AMICUS

The James Madison Center for Free Speech is an internal educational fund of the James Madison Center Inc., a not-for-profit corporation.¹ The purposes of the James Madison Center are to promote, through educational activities, respect for the rights of freedom of speech and freedom of association guaranteed by the First Amendment to the United States Constitution, and to defend the rights of freedom of speech and freedom of association when threatened by government action.

SUMMARY OF ARGUMENT

The right of free political speech is deeply embedded in our nation's history. The Founding Fathers had this right in mind when they drafted the First Amendment. To protect this right, the First Amendment demands that Congress shall make no law abridging the rights of free speech. Thus, the freedom of speech is a withholding of power from the government.

Despite this unequivocal denial of power from the government, preventing corruption or its appearance is the only single narrow exception to the rule that limits on political speech are contrary to the First Amendment. To ensure government does not contravene First Amendment rights except when addressing this single narrow exception, the Court has placed the burden of demonstrating corruption or its appearance on the government.

However, the government is not simply able to posit the existence of corruption or its appearance. Rather, rights

¹ The parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

of political expression and association may not be infringed without substantial support in the record showing the need to do so. Without this evidentiary showing, virtually anything deemed politically undesirable could be turned into political corruption simply by citing to a mere potential for harm. Moreover, without a substantial showing, unreasonable and manipulated public perceptions of an appearance of corruption could serve as the justification for the infringement of cherished First Amendment rights. Missouri has made no showing that actual corruption or its appearance exists within its borders, and therefore has failed to meet its burden.

Missouri's contribution limit, as a restriction on First Amendment rights, must survive strict scrutiny. Therefore, Missouri must demonstrate that the limit it has chosen is narrowly tailored to prevent the demonstrated evil. Evidence demonstrates that Missouri is not regulating with narrow specificity when the percentage of one contribution of the average total expenditures for the Auditor race was so low as to be almost per se noncorrupting. Further, contribution limits are not narrowly tailored when they are so low as to be a cause of corruption.

The indispensable democratic freedoms secured by the First Amendment are not truly secure unless the government is required to bear the burden of providing evidentiary support for its restriction of free speech rights, and demonstrating that the limits chosen are narrowly tailored to address actual corruption or its appearance within its jurisdiction.

ARGUMENT

I. TO ENSURE THAT GOVERNMENT DOES NOT SUPPRESS FIRST AMENDMENT RIGHTS EXCEPT WHERE THERE IS THE UTMOST NEED TO DO SO, THE SUPREME COURT REQUIRES GOVERNMENT TO BEAR THE BURDEN OF PROVING THE EXISTENCE OF THE EVIL IT FEARS.

The Petitioners and several *amici* argue that under *Buckley v. Valeo*, 424 U.S. 1 (1976), the **Respondents** bear the burden of demonstrating that the contribution limits impose an undue restraint on their First Amendment rights. Pet'r Br. at 13, 22, 25, 41. Yet this Court has repeatedly held that to ensure that the government does not suppress First Amendment rights except where there is a compelling need to do so, the **government** must prove the existence of the evil it fears, the source from which it emanates, and that the means chosen are needed to eliminate the evil. *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)("[W]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."); *First National Bank v. Bellotti*, 435 U.S. 765, 789-90 (1978)(The State failed to show "by record or legislative findings that corporate advocacy threatened imminently to undermine the democratic processes."); *In re Primus*, 436 U.S. 412, 432 (1978)("South Carolina must demonstrate 'a subordinating interest which is compelling,' [citation omitted], and that the means employed in furtherance of that interest are 'closely drawn to avoid unnecessary abridgment of associational freedoms.'" (quoting *Buckley*, 424 U.S. at 25)); *Citizens Against Rent Control v. City Of Berkeley*, 454 U.S. 290, 301-02 (1981)(Marshall, J., concurring)("If I found that the record ... disclosed sufficient evidence to justify the conclusion that

large contributions to ballot measure committees undermined the 'confidence of the citizenry in government,' I would join Justice WHITE in dissent on the ground that the State had demonstrated a sufficient governmental interest." (citation omitted)); *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 266 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[I]n this case the Government has failed to show that groups such as MCFL pose any danger that would justify infringement of its core political expression."); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."); *Meyer v. Grant*, 486 U.S. 414, 426 (1988) ("The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns."); *Burson v. Freeman*, 504 U.S. 191, 228 (1992) (Stevens, J., dissenting) ("For that reason, Tennessee must shoulder the burden of demonstrating that its restrictions on political speech are no broader than necessary. . . ."); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) ("It is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" (citation omitted)). See also *Bellotti*, 435 U.S. at 786 (speaker-based restriction); *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 540 (1980) (content-based restriction); *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-54 (1986) (secondary-effects restriction).²

² Lower courts have recognized this rule and have therefore also properly placed the burden upon the government. See, e.g., *Association of Community Orgs. for Reform Now v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983) ("[A]lthough a duly enacted statute normally carries with it a presumption of constitutionality, when a regulation allegedly

Requiring the government to bear this burden comports with the very purpose underlying the First Amendment which is "to foreclose public authority from assuming a guardianship of the public mind. . . ." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring); see also *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting) ("The premise of our Bill of Rights, however, is that there are some things-- even some seemingly *desirable* things-- that government cannot be trusted to do." (emphasis in original)). If a state were not required to bear this burden, a state could with ease restrict First Amendment rights in the service of other objectives that could not themselves justify a burden on political expression. See *Edenfield*, 507 U.S. at 771. Therefore, it is imperative that the government bear this burden. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) ("The need for the State to make such a showing is particularly great given the drastic nature of its chosen means-- the wholesale suppression of truthful, nonmisleading information.").³

infringes on the exercise of First Amendment rights, the statute's proponent bears the burden of establishing the statute's constitutionality." (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)); *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987) ("Where. . . a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality."); *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 555 (2d Cir. 1990) ("It is a well-established rule that where legislation restricts speech, even commercial speech, the party seeking to uphold the restriction carries the burden of justifying it." (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983))).

³ Furthermore, it is irrelevant that the State may have difficulty meeting this burden, see *Meyer*, 486 U.S. at 425 ("For that reason the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable."), if the statute at issue "trenches upon an area in which the importance of First Amendment protections is 'at its zenith,'" *id.*, as does the Missouri statute here.

A. In *Buckley*, This Court Required Proof That The FECA's Contribution Limits Were Necessary To Advance A Compelling Interest.

The Petitioners, and various *amici*, however, argue that *Buckley* stands for the proposition that a demanding review of the Government's evidence is not required.⁴ Pet'r Br. at 29-36. What the Petitioners fail to note is that while the *Buckley* Court found it "unnecessary to look beyond the Act's primary purpose . . . in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation," 424 U.S. at 26, it was because "the deeply disturbing examples surfacing after the 1972 election demonstrate[d] that the problem [was] not an illusory one." *Id.* at 27. Thus, the Court found it unnecessary to look beyond the Act's purpose because it found "deeply disturbing examples" to support the Government's fears of actual and apparent corruption resulting from large contributions given to secure political quid pro quos. The *Buckley* Court cited the court of appeals' opinion which discussed a number of the abuses uncovered. *Id.* at 27 n.28. Dairymen had pledged, and then laundered, \$2,000,000 in contributions in exchange for the President's decision to overrule the

⁴ Prior to *Buckley*, the Court required evidentiary support in a case dealing with a statute prohibiting federal employees from participating in political campaigns. *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973). The Court upheld the provisions of the Hatch Act "against a First Amendment challenge only after canvassing nearly a century of concrete experience with the evils of the political spoils system." *United States v. National Treasury Employees Union*, 513 U.S. 454, 483 (1995)(O'Connor, J., concurring in the judgment in part and dissenting in part); cf. *FCC v. League of Women Voters of California*, 468 U.S. 364, 401 n.27 (1984)(noting that the Hatch Act "evolved over a century of governmental experience with less restrictive alternatives that proved to be inadequate to maintain the effective operation of government.").

Secretary of Agriculture and increase dairy price supports. *Buckley v. Valeo*, 519 F.2d 821, 840 n.36 (D.C. Cir. 1975). Six ambassadorial candidates had donated a combined \$3,000,000 for ambassadorial appointments, *id.* at 840 n.38, and one ambassador had contributed \$100,000 in a trade for an even more prestigious post. *Id.* Therefore, the *Buckley* Court did look for, and found, evidence of *actual* quid pro quo corruption. *Buckley*, 424 U.S. at 27 n.28.

Even assuming *Buckley* applied a lower evidentiary standard, the requirement of evidentiary support should be applied with even more force to the case at bar. The key to the Court's apparent deference to Congress is that an appearance of corruption is "inherent in a system permitting unlimited financial contributions." *Buckley*, 424 U.S. at 28. Prior to the contribution limits addressed by the *Buckley* Court, there existed a system allowing *unlimited* contributions. Therefore, the Court could readily find proof of huge contributions given to secure political quid pro quos. In those jurisdictions where contribution limits already exist, evidentiary proof of actual or apparent corruption must be in the record before lowering the limits in order to satisfy the government's burden of justifying its restrictions on First Amendment speech and association.

B. Subsequent To *Buckley*, This Court Has Required The Government To Bear The Burden Of Proof If It Sought To Infringe On First Amendment Rights.

Subsequent to *Buckley*, the Court has continued to require evidentiary support for a government's attempt to infringe on First Amendment rights. In *First National Bank v. Bellotti*, the Court struck down a Massachusetts law that prohibited corporations from making expenditures in state referendum campaigns, finding that the State had failed to show "by record or legislative findings that corporate

advocacy threatened imminently to undermine democratic processes." 435 U.S. at 789.

But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of citizenry in government.

Id. at 789-90.

Shortly after *Bellotti*, the *Primus* Court also found that rights of political expression and association may not be abridged because of state interests "without substantial support in the record or findings of the state court." *In re Primus*, 436 U.S. 412, 434 n.27 (1978)(citing *Bellotti*, 435 U.S. at 789-90; *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 581 (1971); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *NAACP v. Button*, 371 U.S. 415, 442-43 (1963); *Wood v. Georgia*, 370 U.S. 375 (1962); *Thomas v. Collins*, 323 U.S. 516 (1945)). Specifically, the *Primus* Court found that "[t]he record does not support appellee's contention that undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred in this case." *Id.* at 434-35. And, a "'very distant possibility of harm,' *Mine Workers v. Illinois Bar Assn.*, 389 U.S., at 223, 88 S.Ct., at 356, cannot justify proscription of the activity of appellant revealed by this record." *Primus*, 436 U.S. at 436 (quoting *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967)).⁵

⁵ Likewise, the *Button* Court had previously reached the same conclusion. The *Button* Court found that a potential for conflict of interest or injurious interference with the attorney-client relationship was insufficient in the absence of proof of a "serious danger" of conflict of interest, 371 U.S. at 443, or of organizational interference with the actual conduct of the litigation. *Id.* at 433, 444.

In *Citizens Against Rent Control v. City of Berkeley*, the Court was faced with a statute limiting contributions to \$250 to committees formed to support or oppose ballot measures. 454 U.S. 290. In striking down the statute as contravening the First Amendment, Justice Marshall, in concurrence, addressed the State's failure to provide sufficient evidentiary support:

If I found that the record before the California Supreme Court disclosed sufficient evidence to justify the conclusion that large contributions to ballot measure committees undermined the "confidence of the citizenry in government," [citations omitted], I would join Justice WHITE in dissent on the ground that the State had demonstrated a sufficient governmental interest to sustain the indirect infringement on First Amendment interests. . .

454 U.S. at 301-02 (Marshall, J., concurring). Also concurring that the statute was unconstitutional, Justices Blackmun and O'Connor compared the evidentiary support lacking in *Berkeley* to the "equally sparse" record in *Bellotti*. *Id.* at 303.

The Court again reiterated the necessity for evidentiary support for restrictions upon First Amendment rights in *National Treasury Employees Union*:

[w]hen a Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way.

513 U.S. at 475 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664-66 (1994)(plurality opinion of Kennedy, J.)); see also *NTEU*, 513 U.S. at 483, 485 (O'Connor, J., concurring in part and dissenting in part)(The Court's "cases do not support the notion that the bare assertion of a laudable purpose justifies wide-ranging intrusions on First Amendment liberties" "without any showing that Congress considered empirical or anecdotal data pertaining to abuses by lower echelon Executive branch employees.").

More recently, the Court has required evidentiary support for the Government's claim that political parties can be prohibited from making independent expenditures. See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996)("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures.").

Even within the commercial speech context, which permits laws to burden commercial speech only upon a showing of a rational basis, this Court has required proof that the harms to be restricted are real and not mere speculation or conjecture. See *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 2150 (1997)(Souter, J., dissenting)(Under *Turner*, 512 U.S. at 664, the government has an "obligation to establish the empirical reality of the problems it purports to be addressing" in order to justify an underinclusive regulation of commercial speech.).

In *Edenfield*, for instance, the Court held that a government's burden

is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

507 U.S. at 770-71 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985); *Bolger*, 463 U.S. at 73; *In re R.M.J.*, 455 U.S. 191, 205-06 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 569 (1980); *Freidman v. Rogers*, 440 U.S. 1, 13-15 (1979); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95 (1977)). Justifying the imposition of this requirement, the Court stated that "[w]ithout this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.* at 771. In finding this burden was not met, the Court noted the absence of any

studies that suggest personal solicitation. . . creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear. The record does not disclose any anecdotal evidence, either from Florida or another State, that validates the Board's suppositions.

*Id.*⁶

⁶ Outside the First Amendment context, the Court has also long required evidence to justify burdening rights guaranteed under the Constitution. See *Turner*, 512 U.S. at 667 ("[w]ithout a more substantial elaboration. . . of predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence. . . we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions. . .").

In *Muller v. Oregon*, as a result of the provision of empirical evidence of the working conditions facing women in factories, the Court upheld a state law regulating work place safety at a time when the Court did not seem supportive of such regulations. 208 U.S. 412, 419-20 (1908); see also *Chandler v. Miller*, 520 U.S. 305, 319 (1997)(holding that compulsory drug testing of candidates for certain state offices violated the Fourth Amendment where "[n]othing in the record hints that the hazards [the state] broadly describe[s] are real and not simply hypothetical.").

More recently, the Court has held that Congress lacked the authority under the Commerce Clause to make it a crime to carry a gun within 1,000 feet of a school because Congress failed to demonstrate that gun possession in a local school zone affected interstate commerce. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

The Petitioners and amici cite *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), as support for their argument that deference is due to government restrictions on First Amendment rights and therefore no evidentiary support is required. Pet'r Br. at 27. *NRTW* involved an interpretation of "member" as defined in the Federal Election Campaign Act and whether a corporation or labor union may solicit contributions to a fund only from "members." However, the Court found evidentiary support for this restriction in the "history of the movement to regulate the political contributions and expenditures of corporations and labor unions" that was set out "in great detail in *United States v. Automobile Workers*." *NRTW*, 459 U.S. at 208. After summarizing the development of the regulation of corporations and labor unions, the Court found the statute at issue was "merely a refinement of this gradual development of the federal election statute." *Id.* at 209. The Court cited several cases and statutes documenting the fact that special characteristics of corporations and unions require careful regulation. *Id.* at 208-10 (citing *United States v. Automobile Workers*, 352 U.S. 567 (1957); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937); *Rostker v. Goldberg*, 453 U.S. 57, 64, 67 (1981); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); Tillman Act, ch. 420, 34 Stat. 864; Act of June 25, 1910, ch. 392, 36 Stat. 822; Act of Aug. 19, 1911, ch. 33, 37 Stat. 25; Federal Corrupt Practices Act, 43 Stat. 1070 (1925); Hatch Act, 54 Stat. 767; War Labor Disputes Act of 1943, § 9, 57 Stat. 167; Taft-Hartley Act, 61 Stat. 136; Federal Election Campaign Act of 1971, 86 Stat. 3, amended 88 Stat. 1263 (1974), amended 90 Stat. 475 (1976), amended 93 Stat. 1339 (1980)).

Evidence that *NRTW* did not abolish the requirement of evidentiary support can be found in this Court's refusal to apply *NRTW*'s deference to a federal law that prohibited independent expenditures by political action committees. In *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), this Court examined the record evidence and found that it was only "a hypothetical possibility and nothing more" that an exchange of political favors for uncoordinated expenditures would occur, and consequently was insufficient to demonstrate that the threat of corruption justified the independent expenditure restriction. *Id.* at 498. Thus, the Court agreed with the district court that the "evidence [fell] far short" of supporting a finding of corruption or its appearance, that the evidence was "evanescent" and that its tendency to demonstrate a distrust of PACs was not sufficient. *Id.* at 499-501. In so doing, the Court noted that *NRTW*'s deference to the need for a prophylactic rule was because the "evil of potential corruption had long been recognized." *Id.* (emphasis added). Therefore, contrary to the Petitioners' assertion that *NRTW* requires automatic deference to a government's claim of potential harm, *NRTW*, which found historical evidentiary support, is consistent with the requirement of evidentiary support to justify a restriction of First Amendment rights.

The Petitioners also argue that the modified burden of proof applied in *Munro* and *Timmons* should apply to this case. Pet'r Br. at 32-33. In *Timmons*, the Court stated that "[e]laborate, empirical verification of the weightiness of the State's asserted justifications" is not required. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)). Although the state did not need empirical evidence, the dissent noted that previous cases have required more than a bare assertion that some particular state interest was served by a burdensome election requirement. *Id.* at 375 (Stevens, J., dissenting).

Munro is not analogous to the case at bar for two reasons. First, *Munro*'s "modified burden of proof" does not apply to all cases in which there is a conflict between First Amendment rights and a state's election process. Instead it applies only when the First Amendment right threatens to interfere with the act of voting itself, *i.e.*, cases involving voter confusion from overcrowded ballots, like *Munro*, or cases such as *Burson*, where the challenged activity physically interfered with electors attempting to cast their ballots. However, States must come forward with more specific findings to support regulations directed at intangible "influence," such as the ban on election-day editorials struck down in *Mills v. Alabama*, 384 U.S. 214 (1966). *Burson*, 504 U.S. at 209 n.11. There is no First Amendment right in the case at bar that is threatening to interfere with the act of voting to mandate application of *Munro*'s modified burden.

Second, the contribution limitations here result in a significant impingement on constitutionally protected rights, thus preventing application of *Munro*'s modified burden of proof. *See Burson*, 504 U.S. at 210 (The plurality extended *Munro*'s reasoning and applied a modified burden of proof because the "minor geographic limitation" did not constitute a "significant impingement" on constitutionally protected rights.).

Thus, this Court has long required evidentiary support to justify restrictions on speech, including speech occupying a subordinate position on the scale of First Amendment values, and restrictions on other constitutional rights. Therefore, it should be undisputable that under the cherished First Amendment, evidentiary support should be the minimum required to sustain a campaign finance regulation that impinges upon core First Amendment speech. The First Amendment demands no less. *See generally Bopp, Constitutional Limits On Campaign Contribution Limits*, 11 Regent U. L. Rev. 235 (1998-99).

If the Court were to overturn the precedent of requiring evidentiary support, as urged by the Petitioners and

amici, its effects on the fortress of First Amendment jurisprudence would be far-reaching and devastating. As Justice Scalia pointed out in his dissent in *Austin*, permitting a mere potential for harm to justify restrictions on First Amendment rights would require the "adjustment of a fairly large number of significant First Amendment holdings." *Austin*, 494 U.S. at 689.

Presumably the State may now convict individuals for selling books found to have a potentially harmful influence on minors, ban indecent telephone communications that have the potential of reaching minors, restrain the press from publishing information that has the potential of jeopardizing a criminal defendant's right to a fair trial, or the potential of damaging the reputation of the subject of an investigation, compel publication of the membership lists of organizations that have a potential for illegal activity, and compel an applicant for bar membership to reveal her political beliefs and affiliations to eliminate the potential for subversive activity.

Id. at 689-90. (internal citations omitted). "The Court's explicit acceptance of 'potential danger' as adequate. . . greatly weakens" the fortress of First Amendment jurisprudence. *Id.* at 690.

The reason for the requirement of demonstrable evidence of real or apparent corruption is plain. Allowing a mere potential for harm to justify a restriction of core First Amendment rights would permit legislatures around the country to unduly burden speech deemed undesirable or unpopular. Therefore, the government, in bearing its burden, must come forth with jurisdiction-specific evidence showing corruption or its appearance before it may restrict the First Amendment rights of its citizens.

**II. AS THE COURT OF APPEALS
CORRECTLY HELD BELOW,
MISSOURI HAS FAILED TO CARRY
ITS BURDEN OF DEMONSTRATING
THE EXISTENCE OF CORRUPTION
OR ITS APPEARANCE IN THIS CASE.**

One *amicus* mistakenly suggests the First Amendment does not permit this Court to review the evidence and "conduct a trial *de novo*." Pub. Citizen Br. at 7, 20. However, "[t]his Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles [can be] constitutionally applied." *Primus*, 436 U.S. at 434.

A review of the evidence offered by Missouri shows that it falls short of demonstrating the existence of corruption or its appearance in Missouri. *See* J.A. 46-49. The evidence offered, affidavits from a single legislator and a member of the Missouri Campaign Finance Review Board, is slender, self-serving, and insufficient. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 641 (1995) ("Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and nondeceptive speech." (citation omitted)); *Edenfield*, 507 U.S. at 771 ("The only suggestion that a ban on solicitation might help prevent fraud and overreaching. . . is the affidavit of Louis Dooner, which contains nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its jurisdictions."). A single legislator's perception of corruption provides no way to determine whether his perception is also shared by the public, whether that perception is objectively reasonable, and whether it is derived from the magnitude of contributions that have historically been made. J.A. 7a.

As the court of appeals correctly noted, the senator's affidavit is insufficient evidence because he

pointed to no evidence that "large" campaign contributions were being made in the days before limits were in place, much less that they resulted in real corruption or the perception thereof. [citation omitted]. The senator did not state that corruption then existed in the system, only that he and his colleagues believed there was the "real potential to buy votes" if the limits were not enacted, and that contributions greater than the limits "have the appearance of buying votes."

J.A. 6a-7a.

The court of appeals correctly refused to extrapolate from examples of corruption noted by the *Buckley* Court that problems resulting from large contributions made to federal campaigns over twenty-five years ago demonstrate actual corruption or its appearance in Missouri. J.A. 6a. Requiring the State to prove actual corruption or its appearance within its borders is especially important when dealing with the First Amendment because "when the reason for a restriction disappears, the restriction should as well." *Burson*, 504 U.S. at 223 (Stevens, J., dissenting) (citing courts that found campaign-free zones were no longer necessary). Therefore, to impose a restriction upon First Amendment rights, the State must be required to establish, with evidence, that the contribution limit is necessary in Missouri to combat corruption or its appearance stemming from large contributions. Great care should be taken so that tradition is not confused with necessity and thus allowed to justify a restriction on core First Amendment speech.

Missouri also failed to prove an appearance of corruption exists within its borders. Of the State's evidence, only two pieces even remotely support its position. The first, Senator Goode's affidavit, states he "believe[s] today that contributions over those limits have the appearance of buying votes as well as the real potential to buy votes." J.A. 47. He also avers he "believe[s] that the experience in the last three elections has also shown that the appearance of corruption because of campaign contributions has decreased in state elections." *Id.*

The second piece of evidence, Chairman Maupin's affidavit, states that "Missouri needed the campaign contribution limits to counter the blatant cynicism among the populace that large contributions . . . curried favor with Missouri elected officials." J.A. 48. Furthermore, he stated that "[s]ince enactment of § 130.032.1 RSMo., the perception of corruption in our government has definitely improved [sic] as a result of the campaign contribution limits." J.A. 49.

None of these assertions by the Senator or the former Chairman is corroborated or substantiated in any way. The Court is merely expected to take their word that an appearance of corruption existed and that its appearance has decreased as a result of the limits. It is on the basis on these unsupported assertions that First Amendment rights have been restricted.

In fact, research contradicts the contention that an appearance of corruption exists nationwide. One highly publicized poll released during 1997 by the Center for Responsive Politics found, in part, that 75% favored limiting soft money; 85% favored limiting out-of-district contributions; and 61% favored banning PACs. Center for Responsive Politics, *Money and Politics Survey* (visited June 2, 1999) <<http://www.opensecrets.org/pubs/survey/s2.htm>>. Yet, in that same poll, 47% favored lifting *all* restrictions on campaign contributions. *Id.* And, 41% surveyed did not know federal contribution limits existed for individuals. *Id.*

Clearly, the public is confused, as the total of those favoring more restrictions and those favoring the abolition of all restrictions substantially top 100%.

For more than thirty years, reformers have worked tirelessly to convince the American public that legislators are corrupt and that these regulations are necessary. If this is the case, it should not be difficult for the government to back up these allegations of corruption with evidence.⁷ At a minimum, evidentiary support must be required when States are attempting to regulate to prevent an appearance of corruption. Otherwise, there is "no way to challenge the 'appearance of corruption'-- others' subjective perception that corruption does exist-- other than to make the case that their perceptions are wrong." Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1067 n.113 (1996). Furthermore, the State must prove that this public perception is reasonable because it is "very dangerous to suggest that the mistaken view of some could justify restricting the First Amendment liberties of others." *Id.* "Allowing the 'appearance of corruption' to justify government intrusion on First Amendment liberties essentially allows the majority to justify the suppression of minority rights through its own propaganda." *Id.*

⁷ One legal scholar has advocated that governments and reformers must provide jurisdiction-specific empirical evidence demonstrating corruption or its appearance. See David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 90, 112, (1999).

III. THE CONTRIBUTION LIMITS ENACTED HERE ARE NOT NARROWLY TAILORED.

The first step on the path is analytically marked. The contribution limits implicate First Amendment interests, *Buckley*, 424 U.S. at 23, and therefore strict scrutiny is required. See *Austin*, 494 U.S. at 657 ("whether it is narrowly tailored to serve a compelling state interest"); *Berkeley*, 454 U.S. at 298 ("Contributions by individuals. . . [are] beyond question a very significant form of political expression. . . [and] regulation of First Amendment rights is always subject to exacting judicial scrutiny."); *California Medical Ass'n v. FEC*, 453 U.S. 182, 202 (1981) (Blackmun, J., concurring)("[C]ontribution limitations can be upheld only if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."); *Bellotti*, 435 U.S. at 786 (Court applying "exacting scrutiny."). Therefore, the Court must determine whether Missouri's contribution limits are narrowly tailored. See *Primus*, 436 U.S. at 424 (When a government regulates expressive and associational conduct at the core of the First Amendment's protective ambit, it must regulate only with "narrow specificity.")(quoting *Button*, 371 U.S. at 433); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)(Statutes touching this field should be "narrowly drawn to prevent the supposed evil."). If the contributions that are limited are not large, then the State is infringing upon substantially more speech and association than is necessary and the limits are not narrowly tailored.

The State argues it may regulate contributions because there is a potential for corruption, and that it may attack anticipated harms, not just past or current ills. Pet'r Br. at 32. However, this Court has cautioned that "broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so

closely touching our most precious freedoms." *Button*, 371 U.S. at 438 (internal citations omitted). As a result the *Primus* Court rejected an attempt to regulate prophylactically:

At bottom, the case rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction," [citations omitted]. In the context of political expression and association, however, a State must regulate with significantly greater precision.

Primus, 436 U.S. at 437-38. Thus, "[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *Id.* at 434.

A. Missouri Has Not Demonstrated That Its Contributions Limits Are Narrowly Tailored.

It is clearly apparent that Missouri's contribution limit is not narrowly tailored because it amounts to a difference in kind. See *Buckley*, 424 U.S. at 30. Comparing Missouri's contribution limit as a fraction of campaign expenditures to the same fractional result in *Buckley* shows a significant difference. When the *Buckley* Court approved the \$1,000 limit for federal candidates in 1976, the average overall

expenditure on a federal House race was \$74,000. See Findings of Fact, *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282, No. Civ. S-96-1965, 1998 U.S. Dist. LEXIS 66, *76-77 (E.D. Cal. Jan. 6, 1998) (Finding of Fact No. 280). Dividing \$2,000 (\$1,000 for the primary plus \$1,000 for the general) by \$74,000 shows that the contribution limit permitted one individual to contribute 1/37th (or 2.70%) of the overall expenditures of the average House candidate in 1976.

For the 1998 Missouri Auditor race, an individual was permitted to contribute a mere 0.73%, or 1/137th, of the overall primary and general election expenditures for the race. (Total limit of \$2,150 divided by \$202,712, the average amount expended for both the primary and general election). For data see *Missouri Ethics Commission* (visited May 21, 1999) <http://www.moethics.state.mo.us/MEC/1998_Report.htm>. This percentage is so low as to be almost per se noncorrupting.*

Buckley approved a limit where, on average, an entire campaign could be financed by as few as 37 contributors, notwithstanding the potential for a candidate to fall beholden to those 37 main contributors. If the Court is willing to risk candidates being "bought" by 37 contributors as a tolerable tradeoff for protecting the right to associate with candidates, then there can be no justification for diminishing the risk by

* Former Senator Dan Coats testified that an appearance of corruption would not arise with a \$5,000 or even a \$10,000 contribution as those amounts comprised only one tenth, or one half, of a percent of his approximate total receipts, and these amounts would not have influenced him to change his vote on any issue. Dan Coats, Concerning Contribution Limits to Candidates in Federal Elections, Testimony before the United States Senate Committee on Rules and Administration (May 24, 1999).

spreading it out to 137 contributors to the Missouri Auditor race.⁹

The relevance of this type of analysis is bolstered by Chief Justice Burger's observation in note six of his concurring and dissenting opinion in *Buckley*. There, Justice Burger criticizes the undifferentiated sweep of the \$1,000 limit, suggesting that the potential for corrupting a candidate recipient with a \$1,000 gift will vary enormously from place to place because the costs of running a campaign and the amounts spent by candidates in different locations vary enormously. *Buckley*, 424 U.S. at 244 n.6.

Finally, it is worth noting the limits are not narrowly tailored because inflation has caused them to become different in kind. This Court may take judicial notice of the fact that the \$1,000 limit upheld in *Buckley* in 1976 is now worth only \$302; an equivalent amount in purchasing power today would be \$3,306. See *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 523 n.4 (8th Cir. 1998) (court noting that \$1,075 in 1976 dollars is the equivalent of just \$378 in purchasing power today). After inflation, the \$1,075 limit is so small it cannot even compare to the \$1,000 limit approved in *Buckley*.

Two *amici* erroneously argue that the contribution limits are narrowly tailored because a majority of contributors did not give the maximum amount allowed, and the typical family in Missouri financially cannot make contributions at or near the limit.¹⁰ See Secretaries of State

⁹ The court in *California ProLife Council PAC*, found that various limits constituted only 1/727th and 1/1143rd of the average total expenditures and struck the limits based on this and other factors because they prevented candidates from communicating their messages. Findings of Fact, *California ProLife Council PAC v. Scully*, No. Civ. S-96-1965, 1998 U.S. Dist. LEXIS 66, *76-77 (E.D. Cal. Jan. 6, 1998) (Finding of Fact No. 280).

¹⁰ This argument fails to take into account the various reasons that less than a majority contributed at or near the maximum amount and also does not square with contribution patterns involving federal candidates.

Br. at 10-14; Pub. Citizen Br. at 9. Essentially, these *amici* are arguing that because an alleged majority cannot make contributions near the limit, the rest of the citizenry should be prohibited from doing so as well. However, "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley*, 424 U.S. at 48-49 (citation omitted).

B. Contribution Limits That Are Not Narrowly Tailored Are Themselves A Cause Of Corruption.

Low limits that actually *cause* corruption do not further the State's interest in preventing corruption or its appearance and thus are not narrowly tailored. As a result of federal contribution limits, which over time have become more restrictive due to inflation, incidents of conduit contributions, money laundering, and illegal corporate contributions have increased.¹¹

The Federal Election Commission's enforcement caseload presents some evidence that the federal contribution

Missouri ranked 13th in the nation in 1997-1998 in individual donations of \$200 or more, for a total given of \$10,756,955. See Center for Responsive Politics, *Open Secrets* (visited May 21, 1999) <<http://www.opensecrets.org/states/index/MO.htm>>.

¹¹ In a pending criminal lawsuit brought by the United States Department of Justice, Campaign Financing Task Force, the defendant is charged with, among other things, knowing and willful violation of 2 U.S.C. § 441f, or making contributions in the name of others. *United States v. Haney*, No. 98-0383-RWR (D.D.C. 1998). In his motion to dismiss the indictment, Defendant Haney argued that the \$1,000 campaign contribution limitation impermissibly infringes upon his First Amendment rights because the ravages of inflation have diminished the value of \$1,000 since this Court upheld the limit in *Buckley*. Memorandum of Points and Authorities Supporting Haney's Motion to Dismiss All Counts at 2.

limit of \$1,000 may no longer further the Government's interest in preventing corruption or its appearance and may indeed itself have become a *cause* of corruption. Once limits become ineffectively low, citizens interested in participating in politics are induced to circumvent the limits illegally. One way that individuals, who have already given the maximum permitted under the limits, circumvent the limits is by making "conduit" contributions, in contravention of 2 U.S.C. § 441f.

The FEC has already released more 1996 cases involving conduit contribution allegations, 2 U.S.C. § 441f, than it has had in any year since its inception. See David M. Mason, Testimony at the Hearing on The First Amendment and Campaign Finance Reform before the U.S. House of Representatives Judiciary Committee (Subcommittee on the Constitution)(May 5, 1999)(transcript available at 1999 WL 16947304). The 1996 total is already over 20 percent higher than any previous year, and given the five year statute of limitations, additional § 441f cases may yet be made public. *Id.* In at least some of these cases, it appears donors were motivated by nothing other than enthusiasm for a candidate. *Id.*

A separate search in April 1999 of the FEC's Matter Under Review (MUR) Index, reveals a total of 191 MURs involving alleged § 441f violations. A further search located 11 pre-MURs and MURS, involving § 441f violations, not listed in the MUR Index. Thus, approximately 202 MURs have involved § 441f violations since 1976. Of those 202 MURs, approximately 37 of the alleged § 441f violations occurred from 1976 to 1979, 68 of the MURs involve conduct during 1980 to 1989, and 97 of the MURS relate to alleged violations from 1990 to the present. This translates into a 30% increase in § 441f complaints filed during the 1990s, and almost half of the total alleged violations occurring during the last ten years.

Another corrupting by-product of the federal contribution limits is an increase in political contributions by

minors. See CNN Interactive, *Small children, big political donations* (visited May 20, 1999) <<http://cnn.com/ALLPOLITICS/stories/1999/03/01/diaper.donors/>>; Alan C. Miller, *Sunday Report*, L.A. Times, February 28, 1999, at A1. Some youngsters who are not even old enough to vote are donating generously to candidates.¹² This new trend has been labeled "family bundling" because in many cases, the children's donations came on the same day or about the same time as their parents contributed the maximum amount allowed under federal limits.

Illegal corporate money-in-politics activity has also risen considerably. Of these, conduit contributions have been especially prevalent in the corporate workplace. See C. Cronin & J. Savage Jr., *Corporate Campaign Finance Laws: An Overview*, Mass. Lawyers Weekly, Nov. 4, 1996, at 11 (describing noteworthy cases). A charting of illegal corporate activity cases involving fines of \$25,000 or more imposed by the FEC, the Department of Justice, and other federal and state agencies, by Public Disclosure, Inc. reveals that of the 165 cases listed, 41 occurred from 1969 to 1979 (20 from prior to 1976); 19 cases were from 1980 to 1989; and 105 cases were from 1990 to the present. Public Disclosure, Inc., *The Cost of Corporate Illegal Activity* (visited May 19, 1999) <http://www.tray.com/cgi-win/_vce.exe?>. Roughly 64% of these cases have been brought during the last nine years.¹³

¹² According to FEC records, one diaper donor gave \$4,000 to federal candidates by the time he was two. Alan C. Miller, *Sunday Report*, L.A. Times, February 28, 1999, at A1.

¹³ These figures may just scratch the surface. Because relatively few FECA prosecutions go to trial or otherwise result in conviction-- by their own measure, the Department of Justice obtained roughly 200 criminal convictions for FECA violations through plea bargains from 1988 to 1995-- the reported case law is sparse. See Michael W. Carroll, "Note: When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act," 84 Geo. L.J. 551, 558 (1996)(citing an interview with Craig C. Donsanto,

This increase in illegal corporate conduit contributions, coupled with the increase in § 441f violations and new trends such as "family bundling" demonstrate that the very limits designed to prevent corruption or its appearance have themselves caused a steady increase in corruption.

The distortion of the natural flow of money from donor to candidate has created more problems than it has solved. Like efforts to stop the flow of a river, one way or another, the water will pass, diverting course to do so. We seem to have forgotten the admonition of the First Amendment that Congress, and the states through the Fourteenth Amendment, shall make no law abridging the rights of free speech. Yet the "reformers" propose regulations on top of the regulations. In trying to limit contributions, they are forced underground where they cause corruption, which it turn breeds contempt for the very political process they are working to protect.

A reading of the *amici* briefs submitted in support of the Petitioners' position reveals that few of the *amici* even acknowledge the manifest importance of the constitutional impediments to their proposed reforms.¹⁴ One *amicus* brief, submitted by various States, goes so far as to suggest that the First Amendment "rightly give[s]" them authority. States Br. at 1. They view the First Amendment not as a limit on their power to regulate, as the Founding Fathers envisioned, but as a source of their power. See *id.* at 3-4 ("Only where those limits prevent candidates from waging a vigorous campaign should the First Amendment be read to block their enforcement. Short of that showing by a

Director, Election Crimes Branch, Public Integrity Section, U.S. Dept. of Justice (April 19, 1995)).

¹⁴ Few of the *amici* mention the First Amendment other than in passing. See Secretaries of State Br. at 18, 19 (mentioning the First Amendment only twice and not until page 18).

candidate, the States should be free to determine for themselves the most appropriate dollar-amount limit. . . ."). The freedom of speech is not a grant of power *to* the government; rather, it is a withholding of power *from* the government. See Lillian R. BeVier, Campaign Finance "Reform" Proposals, A First Amendment Analysis, Cato Policy Analysis No. 282 (Sept. 4, 1997)(also available at <<http://www.cato.org/pubs/pas/pa-282es.html>>). They fail to see that the First Amendment was designed to *protect* political speech, rather than limit it.

For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

Bridges v. California, 314 U.S. 252, 263 (1941). The First Amendment is not a loophole in the system of campaign finance, nor is it merely an obstacle to reform which must be overcome. See generally, Bopp & Coleson, *The First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA Law Rev. 1 (1997). Rather it is a fortress of freedom for citizens that safeguards not only free speech, but the very system of representative self-government which is our heritage.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Dated: June 4, 1999

Supreme Court, U. S.

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No. 98-963

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON, *et. al.*
Petitioners,

V.

SHRINK MISSOURI GOVERNMENT PAC, *et. al.*
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit**

BRIEF FOR

**THE FIRST AMENDMENT PROJECT OF
THE AMERICANS BACK IN CHARGE FOUNDATION
AND REPRESENTATIVES JOHN T. DOOLITTLE AND TOM DELAY
AS AMICI CURIAE SUPPORTING RESPONDENTS**

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INTEREST OF *AMICI*¹

Americans Back in Charge Foundation is a nonprofit educational foundation established in 1991 dedicated to empowering citizens in the political process. The First Amendment Project educates the public, the media, and elected officials by presenting testimony, publishing articles, and filing *amicus curiae* briefs (as appropriate) in litigation involving campaign finance proposals, the regulation of political speech by government, and the impact of such restrictions on First Amendment freedoms.

Representatives John T. Doolittle (R-CA 4) and Tom DeLay (R-TX 22) are the principal sponsors of H.R. 1922, The Citizen Legislature and Political Freedom Act, that will encourage political speech by eliminating the limits and restrictions currently in place and requiring full and prompt electronic disclosure of contributions and expenditures.

The *amici* are dedicated to the principle of full disclosure of campaign contributions and expenditures as an alternative to government restraint and regulation of political speech. The *amici* believe that there are massive efforts underway in this nation that would sacrifice the First Amendment to ill-conceived and misguided campaign finance "reform" proposals through increased regulation by government of the citizens' rights to political speech and expression.

The *amici* believe that the instant litigation will have great bearing on the ability of the American people to exercise important First Amendment freedoms in the political arena. The First Amendment Project and Representatives Doolittle and DeLay submit this *amicus curiae* brief to aid the Court's consideration of the fundamental principles at issue here.

¹ Letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Missouri law limiting campaign contributions violates the First Amendment, and the Eighth Circuit's decision invalidating the law should be upheld. Because the statute at issue implicates and violates the First Amendment, the Court should not defer to the State of Missouri's legislative enactment in this regard.

Buckley v. Valeo established that campaign contributions and expenditures implicate the First Amendment protections of free speech and political expression. The Court has consistently held that state laws that implicate First Amendment principles are subject to strict scrutiny by the Court. The State of Missouri has not met its constitutionally mandated burden to demonstrate that its legislative decision is based on factual findings that establish a compelling interest in the State's infringement of the First Amendment rights of its citizens. There is no factual record demonstrating that actual or apparent corruption either exists or is cured by the arbitrary contribution limit enacted by the legislature, the test established by the Court in *Buckley*.

Instead, Petitioners have offered mere conjecture and speculation about the existence of a reputed problem not articulated in *Buckley*: a poll-driven 'public concern' about generic and undefined corruption in the electoral system. Such amorphous disquiet does not justify the imposition of arbitrary political contribution limits by the Missouri legislature.

Further, the State of Missouri is entitled to no deference, having crafted a legislative solution that evidences no amelioration of the reputed problem ("public concern about money in the political process") and which is not narrowly tailored to overcome First Amendment objections. Petitioners cite to no evidence that the solution (state limits on contributions) have or will ameliorate the purported problem. In fact, Petitioners' *amici curiae* argue vigorously for increasing restrictions and regulation of political speech because, presumably, the existing limits are not enough. Their animus to First Amendment protections of political speech are philosophical – and point toward total elimination of all campaign contributions to any candidate(s) by any person(s). That is precisely the scheme rejected by the Court in *Buckley* on First Amendment grounds.

This case affords the Court the opportunity to review the development of the law and society in this arena since the Court's

decision in 1976, forcing the State of Missouri to seek other remedies to solve its purported problem. For instance, the development of computer technology provides the opportunity for instantaneous disclosure of all campaign contributions and expenditures to all candidates via the Internet, a capability that did not exist twenty years ago. That and other remedies are more narrowly tailored to address Petitioners' stated concerns without violating the First Amendment.

Finally, Petitioners posit the existence of some "common sense" exception to First Amendment protections. There is no such exception. Subjecting the Missouri contribution limit to the strict scrutiny of the Court under customary First Amendment jurisprudence requires the Court to uphold the decision of the Eighth Circuit, invalidating the Missouri statute.

ARGUMENT

I. THE COURT NEED NOT DEFER TO THE MISSOURI STATE LEGISLATURE WHEN, AS HERE, THE STATUTE VIOLATES THE FIRST AMENDMENT.

The First Amendment commands that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend I. The Fourteenth Amendment makes the First Amendment applicable to the states. See *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 336 n.1 (1995). By imposing unreasonably low limits on campaign contributions, the Missouri legislature has abridged constitutionally protected speech and trampled on “the proposition that freedom of expression upon public questions is secured by the First Amendment.” *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). Therefore, the Court must consider this case “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.” *Id.* at 270.

A. Because the Missouri Contribution Limitation Implicates the First Amendment, Strict Scrutiny of the Statute’s Constitutionality is Required.

The Supreme Court recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976), that the expenditure of funds by political candidates and the making of campaign contributions to political candidates are both protected speech. See *id.* at 14. While Petitioners seek to narrow the Court’s holdings in its campaign finance jurisprudence, the Court should simply look to its own unambiguous language in *Buckley*: “[T]he Act’s contribution and expenditure limitations both implicate fundamental first amendment interests.” *Id.* at 23 (emphasis added). It is true that expenditure limits, in the Court’s view, do “impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions.” *Id.* However, “it does not follow . . . that political contributions are not entitled to full First Amendment protection.” *California Medical Ass’n v. FEC*, 453 U.S. 182, 202 (1981) (Blackmun, J., concurring). To the

contrary, “*Buckley* states that contributions and expenditure limits both implicate fundamental First Amendment interests.” *Id.*

It is well established that a law’s implication of the First Amendment triggers strict scrutiny. As the Court has stated, “[e]specially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, ‘the State may prevail only upon showing a subordinating interest which is compelling.’” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960)). Furthermore, the law can only survive if it is narrowly tailored to serve that interest “without unnecessarily interfering with First Amendment freedoms.” *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989). See also *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990). The Missouri law fails the strict scrutiny test on both counts. See Parts I.B and II.B *infra*.

This Court’s precedents leave no doubt that strict scrutiny is the standard that must be applied to the Missouri law. The application of strict scrutiny as the standard for reviewing contribution limits began with *Buckley*, and the Court has never wavered from it. As the Eighth Circuit observed, “The Court has not ruled that anything other than strict scrutiny applies. When the Court in *Buckley* analyzed the contribution limits, it articulated and applied strict scrutiny.” *Carver v. Nixon*, 72 F.3d 633, 637 (8th Cir. 1995), *cert. denied* 518 U.S. 1033 (1996) (striking down as violative of the First Amendment a Missouri law similar to that in the instant case). *Buckley*’s progeny supports that analysis. As explained in *California Medical Association*:

[C]ontribution limitations can be upheld only if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgements of associational freedoms.

453 U.S. at 202 (Blackmun, J., concurring). In its decision in the instant case, the Court would be wise to adopt the views of Justices O’Connor and Blackmun that “[t]he contribution limitations at issue here encroach directly on political expression and association. Thus, [the law] cannot survive constitutional challenge unless it survives strict scrutiny.” *Citizens Against Rent*

Control v. Berkeley, 454 U.S. 290, 302 (1981) (Blackmun and O'Connor, J.J., concurring).

B. The Court Need Not Defer to Legislative Decisions Based Upon Conjecture or Speculation When No Objective Factual Findings Are Contained in the Record Sufficient to Compel the State's Infringement of First Amendment Rights.

As justification for the statute, Petitioners advance only theoretical fears harbored by some unknown number of unidentified citizens that campaign contributions above an arbitrary level create an appearance of corruption. See Brief of Petitioner at 2 ("There is a real fear, perhaps stronger today than at any time in recent memory, that money is harmfully distorting the nation's political process."); *id.* at 30 ("Like all citizens of the United States, Missouri citizens are members of the public to whom a 'regime of large individual contributions' appears corrupt, and whose confidence in representative government is consequently eroded."). The Court need not defer to a legislature's enactment based on mere abstractions, particularly when First Amendment rights are at stake and strict scrutiny has been triggered.

Strict scrutiny requires that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms," and an interest is not compelling merely because the State says it is. *NAACP v. Button*, 371 U.S. 415, 438 (1963). Whether or not the interest Missouri claims it is advancing is compelling is ultimately a subject for the Court, not the Missouri legislature, to decide. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). In fact,

in cases raising First Amendment issues . . . an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1038 (1991) (internal quotations omitted). Clearly, Missouri's request for deference cannot be honored by this Court when evaluating if the State's campaign contributions limitations violate the Constitution.

Petitioners claim that Missouri's laws restricting political speech by limiting campaign contributions are justified by the State's compelling interest in ameliorating corruption or the appearance of corruption. See, e.g., Brief of Petitioners at 29 (arguing that the "State's interest in attacking the appearance of corruption is so compelling" that the Court need not "look beyond the Act's primary purpose . . . in order to find a constitutionally sufficient justification" for contribution limitations.) These claims are supported neither in the legislative record that served as the basis for adoption of the statute nor by any evidence in these proceedings. Petitioners have offered no evidence that contributions in excess of its limits cause or have caused corruption of any specific official or group of officials. The Missouri legislature made no findings that an \$1,100 contribution would corrupt a candidate for governor of Missouri while a \$1,050 contribution would not. Instead, Missouri approaches the concept of "corruption" with precisely the kind of vagueness the Court has previously held intolerable. See, e.g., *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 497-98 (1985) ("*NCPAC*") ("But precisely what the 'corruption' [the government sought to prevent by limiting PAC expenditures] may consist of we are never told with assurance.").

Indeed, even if the Court were inclined to give deference to the legislature, there are no factual findings in this record to which it could defer. The Federal Election Commission's most recent attempt to get a court to defer to its assertion that the "corruption or appearance of corruption" rationale was adequate to justify limiting contributions to candidates by political parties was similarly deficient. See *FEC v. Colorado Republican Fed. Central Comm.*, No. 89 N 1159, 1999 WL 86840 (D. Colo. Feb. 18, 1999) ("*Colorado Republican II*"). Examining the FEC's attempt to persuade the court that Congress's alleged rationale for restricting speech by political parties was compelling and entitled to deference, Judge Nottingham observed:

The FEC makes numerous factual assertions, for example, based on reports in newspaper articles.

Except as otherwise noted, the discussion which follows simply ignores the mass of irrelevant and/or inadmissible evidence in the record.

Id. at *3. Judge Nottingham went on to explain why all of the “hundreds” of examples of “proof” of corruption cited by the government in *Colorado Republican II* are inadequate to justify the State’s interest. Here, Petitioners have offered far less justification than did the FEC in *Colorado Republican II*. Reliance on newspaper articles, public opinion polls, and other hearsay evidence is a frequent technique of those, like Petitioners, who favor restricting political speech. See Brief of Petitioners at 35 (urging reliance on “newspaper articles and editorials” that provide “additional evidence that the public perceives the political process as corrupted by influence buying”). Such evidence proves nothing for strict scrutiny purposes.

With no facts on which it can rely, Petitioners are left with arbitrary labels and speculative predictions. Petitioners want the court to recognize donations over \$1,075 as corrupting simply because the legislature has arbitrarily labeled them as corrupting. Petitioners and supporting *amici* predict that large contributions will infect Missouri politics if left unchecked and speculate that the State’s restrictive remedy will restore public confidence. This is inadequate to justify meaningful deference. The Court “cannot allow the Government’s suggested labels to control [its] First Amendment analysis.” *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 627 (1996) (Kennedy, J., concurring).

Petitioners argue that the “[l]egislature must be able to attack anticipated harms, not just past or current ills.” (Brief of Petitioners at 32.) However, because Missouri is defending “a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.” *Id.* at 618 (plurality opinion) (quoting *Turner Broadcasting Systems v. FCC*, 512 U.S. 662, 664 (1994)). Rather, Missouri must “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995). See also *NCPAC*, 470 U.S. at 499 (“A tendency to demonstrate distrust of PACs is not sufficient.”). As Justice Brandeis reminded

us, the Court cannot defer to mere speculation about serious harms. Fear of harm alone cannot justify suppression of political speech. After all, “[m]en feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable grounds to fear that serious evil will result if free speech is practiced.” *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). Missouri offers no such reasonable grounds but relies instead on fear alone. Corruption and its appearance are Missouri’s witches, and to vanquish them, the legislature would burn the First Amendment. The Court need not defer to that choice.

C. The Application of Consistent First Amendment Principles to Missouri’s Limits on Campaign-Related Speech Requires No Greater Deference than Other Types of First Amendment Expression.

Over the last half century, the Court has repeatedly protected various forms of expression against governmental restrictions. The Court made it virtually impossible for government to impose prior restraints on a free press. See *New York Times v. United States*, 403 U.S. 713 (1971). The Court recognized that the First Amendment protects wearing armbands to protest the Vietnam War. See *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969). Wearing a jacket bearing the words “F—k the Draft” was held to be speech “entitled to constitutional protection.” *Cohen v. California*, 403 U.S. 15, 21 (1971). Burning the American flag cannot be punished under the First Amendment, even when the crude expressive value of that conduct is weighed against a state interest in “preserving the flag as a symbol of nationhood and national unity.” *Texas v. Johnson*, 491 U.S. 397, 410 (1989). Indecent sexual expression, including dial-a-porn services, is protected by the First Amendment. See *Sable*, 492 U.S. at 126. The Court struck down on First Amendment grounds a law prohibiting indecent sexually explicit text, pictures, and chats on the Internet even after acknowledging that the material ranged “from the modestly titillating to the hardest core.” *Reno v. ACLU*, 117 S. Ct. 2329, 2336 (1997).

The Missouri law in the instant case provides the Court with an opportunity to state definitively that as surely as it protects flag

burning and dial-a-porn, the First Amendment also protects political speech. If the Court does not defer to the states in cases involving indecent clothing and Internet pornography, surely it does not owe deference to the Missouri legislature in the matter of political speech. Wearing a jacket urging readers to "F—k the Draft" cannot be entitled to more First Amendment protection than contributing money to a candidate for Missouri State Auditor. The Court should seize this moment to reaffirm its prescient declaration that "the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

II. THE STATE OF MISSOURI IS NOT ENTITLED TO DEFERENCE IN ITS CRAFTING OF A LEGISLATIVE SOLUTION THAT NEITHER EVIDENCES AMELIORATION OF A PUBLIC PROBLEM NOR IS NARROWLY CRAFTED TO COMPLY WITH THE FIRST AMENDMENT.

Even if the Court finds a compelling state interest in Missouri's contribution limits, there is no indication that the solution enacted will solve the purported problems. Nor is Missouri's statutory solution narrowly tailored as required when First Amendment principles are at stake.

A. The Court Should Not Defer to a Constitutionally Questionable Legislative Decision that Cannot Be Shown to Ameliorate the Reputed Problem.

Petitioners posit that the ill-defined problem of perceived corruption can be remedied by placing limits on campaign contributions. (Brief of Petitioner at 13.) Surely if limiting campaign contributions were an appropriate remedy for the problem Petitioners claim to exist, the public's confidence in the federal electoral system would be quite strong today. For more than twenty years, the Federal Election Campaign Act of 1974 ("FECA") has limited campaign contributions to federal candidates. See 2 U.S.C. § 431, *et. seq.*

1. Since Buckley there has been an explosion in the regulation of political speech.

In the twenty-three years since *Buckley* upheld parts of the FECA regulatory scheme, regulation of political campaign speech by the federal government has mushroomed. The government has punished and attempted to punish the political speech of individuals and organizations across the political spectrum. See, e.g., *Colorado Republican*, 518 U.S. 604 (discussing FEC efforts to punish speech of a state political party); *Austin*, 494 U.S. at 936 (discussing FEC efforts to punish speech of a nonprofit corporation); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) (discussing FEC efforts to punish speech of a congressional campaign committee); *Republican National Comm. v. FEC*, 445 U.S. 955 (1980) (discussing FEC efforts to punish speech of a national political party); *FEC v. Christian Action Network*, 110 F.3d 1049 (1997) (upholding lower court's finding that words of "express advocacy" are necessary before the FEC can regulate speech of a non-profit organization and ordering the FEC to pay costs and fees).

Notwithstanding the fact that courts have been unwilling to sustain the FEC's attacks on political organizations, the FEC has reached even further to attack the printed press under the banner of fighting "corruption". In 1998, the government sought civil penalties against *Forbes Inc.*, the publisher of *Forbes Magazine*, because the magazine published essays written by its editor, Steve Forbes, while he was running for president, even though none of the columns referenced his candidacy or any other candidacy. See Complaint in *FEC v. Forbes*, No. 98 Civ. 6148 (S.D.N.Y. Aug. 31, 1998) (dismissed with prejudice, February 18, 1999).

This litany of cases, which is but the tip of the iceberg, illustrates the leviathan of speech restrictions imposed by the government when it assumes the role of speech guardian.

2. Even with over-reaching speech regulation, the perception of corruption has not been remedied.

Yet, notwithstanding the explosion of regulations on political speech, those who advocated such measures in 1976 as the "cure"

for public cynicism can point to little success from the regulations. Instead, the opposite is true. The Petitioners and their *amici curiae* argue that the contribution limits in the Missouri statute are essential to "maintain the public's confidence in the integrity of our political system," because the public's confidence has been *decreasing*. (Brief for *amici curiae* Senator John F. Reed et. al. at 1.)

The members of Congress who wrote as *amici curiae* are actually working to *increase* the regulation of political speech and expression related to federal campaigns. See Bipartisan Campaign Reform Act of 1999, S. 26, 106th Cong. ("McCain-Feingold bill"), and Bipartisan Campaign Reform Act of 1999, H.R. 417, 106th Cong. ("Shays-Meehan bill"). *Amicus curiae* Sen. Jack Reed (D-R.I.) argued on the floor of the United States Senate in 1998 that such increased regulation is justified by the erosion of public confidence in the electoral process:

What we are witnessing today in our electoral process encompasses this form of insidious corruption – *not specific misdemeanors, or infractions*, but a system in which the American people are losing faith and confidence, that they are seeing their system transform from one in which free elections are based on the merits of the candidate to one which they perceive is based upon simply the sheer volume of cash that flows into the system. This corrupting influence is weakening our ability to govern and the confidence of the people in our motives and indeed our actions.

CONG. REC., 105th Cong., 1st Sess., Oct. 7, 1998 (emphasis added). Rep. Christopher Shays (R-Conn.) echoed those sentiments in arguing for passage by the House of Representatives last year of his bill of doubtful constitutional validity that would restrict political speech in federal and state campaigns:

Eighty-four percent (84%) of my constituents said they believe, and I quote, 'Our democracy is threatened by the influence of *unlimited campaign*

contributions by individuals, corporations, labor unions, and other interest groups.'

CONG. REC., 105th Cong., 2d Sess., Mar. 30, 1998 (emphasis added). Thus, Petitioners have established that the regulations already in place have done nothing to ameliorate the purported problem. Amazingly, they cite the failure of the regulations as justification to ratchet up the level of restrictions to new heights. This argument is "one logical proposition detached from history [that] leads to another, until the Court produces a result that bears no resemblance to the America that we know." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 696 (1995) (Scalia, J. dissenting).

In *Colorado Republican II*, the court required the FEC to establish by admissible evidence that "limiting party coordinated expenditures is necessary to avoid corruption or the appearance thereof." 1999 WL 86840, at *12. Here, the only evidence of the impact of regulation is that *amici curiae* members of Congress clamor for still more regulation because the existing regulations have not solved the problem.

3. *Because Petitioners cannot show that increased regulation will solve the problem, the Court must not defer to the legislature.*

The Court is reluctant to leave to a legislature the decision of whether its enactment passes constitutional muster, especially if the issue implicates a fundamental right. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc* 435 U.S. at 843. Courts reviewing legislative actions must look to see whether the conduct at issue falls within the reach of the statute in question. See *id.* at 844. "Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Id.* See also *Pennkamp v. Florida*, 328 U.S. 331, 335 (1946) (holding that the Court must determine if legislation violates the First Amendment, rather than leaving the determination to the legislature itself).

The Court must stop the legislative efforts to erode the First Amendment. Because Petitioners cannot demonstrate that the proposed remedies will ameliorate any perceived problem, the Court should not defer to their questionable legislative findings, lest the First Amendment be smothered by the continuous expansion of regulation.

B. The Court Cannot Defer to the Legislature When the Legislation Restricting the First Amendment Is Not Narrowly Tailored.

Missouri's law cannot survive the strict scrutiny required by *Buckley* and its progeny unless it can demonstrate that the statute is narrowly tailored to serve a compelling interest. See *Austin*, 494 U.S. at 657; Part I.A *supra*. A statute is narrowly tailored if it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 486 U.S. 789, 808-10 (1984)).

1. The proposed remedy is not narrowly tailored.

Missouri must craft its law narrowly to address *only* the problem identified. When a statute implicating First Amendment rights is not narrowly tailored, the danger is that the rights implicated will be eviscerated. See *Riley v. National Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 794 (1988) (holding that statutes setting percentage limits on charitable fundraisers' fees were unconstitutionally vague because they gave no specific way to measure the reasonableness of the set limit, thus creating a scheme that would "necessarily chill speech in direct contravention of the First Amendment's dictates."). See also, e.g., *Boos v. Barry*, 485 U.S. 312, 325-26 (1988) (invalidating a District of Columbia law prohibiting the carrying of any sign within 500 feet of a foreign embassy if the sign would bring any type of "public disrepute" to the foreign government, because the law was not sufficiently narrowly tailored to meet the government's stated goal of protecting the dignity of foreign leaders without trampling on the public's right to free speech); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984) (finding a

statute that set percentage-based tests for fundraising was an unconstitutional abridgement of free speech because it was not narrowly tailored to meet the State's goal of preventing fundraising fraud); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (declaring that a local ordinance requiring charitable organizations to use 75% of all funds for charitable purposes was not narrowly tailored).

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victim's Board*, 502 U.S. 105 (1991), the Court invalidated New York's "Son of Sam" law, which was enacted to keep criminals from profiting from their offense and to compensate victims of the crime. The means New York employed to accomplish these goals, however, were "overly broad." *Id.* at 119-20. The laws would have subjected Malcolm X, Henry David Thoreau, and Martin Luther King, Jr. to its requirements because all three had been convicted of violating laws. See *id.* at 121-22. The Missouri law is similarly overly broad. It imposes regulations on citizens, even those who have no history or intention of corrupting any candidates.

2. There are many narrowly-tailored methods to prevent corruption without limiting speech.

Petitioners argue that "[t]here is a real fear, perhaps stronger today than in recent memory, that money is harmfully distorting the nation's political process." (Brief for Petitioners at 2.) Yet "the proper course of action is not to limit speech by permitting unnecessary and unconstitutional limitations on the parties' and candidate's freedoms of speech and association but, rather, to engage in more speech to educate the public." *Colorado Republican II*, 1999 WL 86840, at *16 (citing *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977); *Whitney*, 274 U.S. at 377).

Since 1976 and the Court's *Buckley* decision, technological advances have provided easier access to information that educates the public about both the sources and uses of campaign funds. The Internet, cable and satellite television, and a flood of rapidly prepared and disseminated publications provide a vast quantity of virtually instantaneous information to the electorate. Thus,

Missouri has at its disposal the ability to engage in more speech and to educate the public.

Even if Missouri is ultimately able to pinpoint the "corruption" or perceived corruption it seeks to eliminate, the State should be required to adopt other, less intrusive means of ameliorating the problem that satisfy the First Amendment's command of a narrowly-tailored statute.

III. THERE IS NO "COMMON SENSE EXCEPTION" TO PROTECTION OF FIRST AMENDMENT RIGHTS.

Without concrete findings that large contributions corrupt the political process, Petitioners argue that "Missouri certainly is permitted to rely upon common sense and accepted tenets of human behavior in adopting rules governing its elections." (Brief of Petitioners at 30.) Even where the Court has agreed with the common sense rationale of a state legislature, it refuses to allow a law restricting speech to stand when there is no concrete evidentiary support that the law will advance the State's interest. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (holding the State's prohibition on liquor price advertising to be an unconstitutional restriction on free speech even though the advertising would, based on common sense, prevent price competition, raise prices, and therefore reduce alcohol consumption). Similarly, while the Texas legislature had the common sense belief that burning an American flag could potentially incite others to disturb the peace, the Court was unwilling to support such a claim in the absence of evidence in the record. *See Johnson*, 491 U.S. at 409. The Court has specifically refused to allow the legislature to justify restrictions on political speech with common sense speculation of a future harm, requiring instead that the legislature "must demonstrate that the recited harms are real, not merely conjectural." *Treasury Employees*, 513 U.S. at 475. Clearly, a legislature may not trample on First Amendment rights without evidence of a problem simply because it has the "common sense" to do so.

Similarly, Petitioners claim that the "[t]he district court's common-sense conclusion is amply supported by a record at least as telling as that relied on in *Buckley*." (Brief of Petitioners at 34.) However, in *Buckley*, the Court had before it a number of specific "deeply disturbing examples . . . demonstrat[ing] that the problem

is not an illusory one." *Buckley*, 424 U.S. at 27. Nowhere do Petitioners cite to any actual examples of corruption. Without proof that large contributions lead to corruption, the Court must not allow the Missouri legislature to use its "common sense" to trump the First Amendment.

IV. IF A LAW IS REPUGNANT TO THE CONSTITUTION THE COURT WILL NOT UPHOLD IT MERELY BECAUSE IT REFLECTS THE POPULAR WILL OF THE PEOPLE.

Petitioners submit that the Missouri statute should be upheld because the citizens "through their elected representatives and through Proposition A², sought to enact contribution limits." (Brief of Petitioners at 34.) In other words, Petitioners are suggesting that if a law is popular, it is inherently constitutional.

Yet, the very premise of judicial review, of the entire system of checks and balances and federalism, and the reason for enacting the Bill of Rights, is to protect the liberties of individuals against unconstitutional acts imposed by the majority. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 179 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is."); *Martin v. Hunter's Lessee*, 14 U.S. 304, 344 (1816) ("The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity.").

On a number of occasions, the Court has been willing to strike down popular laws that violate the Constitution. For example, the Court recently determined that a portion of California's attempt at welfare reform violated the Constitution, even though the great majority of citizens supported the 1996 welfare reforms that enabled California to implement the unconstitutional provisions. *See Saenz v. Roe*, No. 98-97, 1999 U.S. LEXIS 3174 (May 17,

² Proposition A, approved by 74% of the voters in 1994, created even lower limits on contributions than the legislation currently under review, and was held to be unconstitutional. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), cert. denied, 518 U.S. 1033 (1996).

1999).³ Additionally, the Religious Freedom and Restoration Act, a law supported by many religious groups, was found to be unconstitutional. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Finally, at a time when many Americans believed that it should be a crime to burn the American flag, the Court struck down a Texas law prohibiting flag desecration. *See Johnson*, 491 U.S. 397.

Similarly, the Court has not shied away from striking laws adopted by initiative or referendum that are unconstitutional "because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control*, 454 U.S. at 295. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (overturning Colorado's Amendment 2, a law enacted by initiative which prevented localities from adopting special protections for homosexuals); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (overturning Arkansas's congressional term limits, which were enacted by initiative)⁴; *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (striking down an Oregon constitutional amendment adopted by initiative limiting judicial review of punitive damages); *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982) (striking down a Washington statute adopted through initiative limiting the schools to which students could be assigned by a school district); *Brockett v. Spokane Arcades, Inc., v.* 454 U.S. 1021 (1981) (summarily affirming the Ninth Circuit's decision to strike down a Washington moral nuisance law adopted by initiative as an impermissible restraint on free speech). Thus, Petitioners' contention that the Missouri law is constitutional and entitled to deference because it is a popular reflection of the will of the people, must fail.

³ A CNN/USA Today/Gallup Poll found that 68% of the American people supported the welfare reform bill passed by Congress and signed by President Clinton in 1996. *See The Hotline* (Aug. 9, 1996).

⁴ In fact, the result of *U.S. Term Limits* was to invalidate similar laws adopted via initiative in 21 other states, which combined had received over twenty-five million votes. *See CLETA MITCHELL, SETTING LIMITS* at 94 (1996).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Supreme Court of the United States

October Term, 1998

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Petitioners,

v.

SHRINK MISSOURI GOV'T PAC, ZEV DAVID FREDMAN, AND JOAN BRAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF SENATOR MITCH MCCONNELL,
MISSOURI REPUBLICAN PARTY,
REPUBLICAN NATIONAL COMMITTEE, AND
NATIONAL REPUBLICAN SENATORIAL
COMMITTEE, AMICI CURIAE IN SUPPORT OF
RESPONDENTS**

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INTEREST OF THE AMICI CURIAE

All *amici curiae* represented in this brief have acquired considerable practical experience over the last twenty-five years complying with federal and state contribution limits.¹ The Missouri limit at issue here, currently \$1075, threatens free speech and associational rights in the same manner as those other limits.

Amicus Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky, and is also Chairman of the *amicus* National Republican Senatorial Committee ("NRSC"). Senator McConnell has been and will be subject to federal contribution limits, and has gained a reputation as the Senate's foremost advocate of First Amendment protection for political speech.

Amicus Missouri Republican Party is a state political party committee responsible for the day-to-day affairs of the Republican party in Missouri. It is subject to contribution limits for parties specified in Mo. Senate Bill No. 650 (1994) (codified at Mo. Ann. Stat. § 130.032 (West 1999)) and obtained a ruling that those limits violate the First Amendment. *Missouri Republican Party v. Lamb*, 31 F. Supp. 2d 1161 (E.D. Mo. 1999). The Missouri Republican Party works with candidates who are subject to the limit at issue in this case.

Amicus Republican National Committee ("RNC") is an unincorporated association created by the Rules of the Republican Party adopted on August 12, 1996, by the Republican National Convention in San Diego, California. *Amicus* NRSC is also an unincorporated association comprising the Republican members of the United States Senate. The RNC and NRSC are national political party committees registered with the Federal Election Commission ("FEC"). Each is subject to and complies with

¹ The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

applicable contribution limits imposed by the federal and state governments, and works closely with candidates who are subject to such limits.

SUMMARY OF THE ARGUMENT

I. Twenty-five years of experience with contribution limits have shown that limits have a "severe adverse effect" on the ability of candidates to fund their campaigns. Even regulation advocates contend that contribution limits have failed to ameliorate the problems they were intended to solve. Accordingly, the time has come for this Court to revisit whether contribution limits are consistent with the First Amendment.

II. Even if this Court declines to hold contribution limits per se offensive to the First Amendment, it should continue to apply "strict scrutiny" to such limits to assure that post hoc justifications are not used to mask illegitimate motives.

III. Respondents submitted un rebutted evidence to show that the \$1075 contribution limit interfered with their speech and associational rights. In contrast, the State failed to produce probative, much less compelling, evidence that the limit was adopted in response to actual or apparent corruption. In any event, an unfounded public perception of corruption would be an insufficient basis for sustaining an infringement of First Amendment rights. Finally, evidence outside the record rebuts any compelling need for the Missouri contribution limit.

ARGUMENT

I. THE COURT SHOULD REEXAMINE WHETHER THE FIRST AMENDMENT TREATS CONTRIBUTIONS DIFFERENTLY THAN EXPENDITURES.

In the twenty-three years since this Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976), a dozen Supreme Court cases and scores of state and lower federal court cases have applied the four basic propositions underlying the decision: Political speech costs money, restrictions on political fundraising and spending infringe fundamental First Amendment freedoms, such restrictions will be upheld only if narrowly tailored to serve a compelling government interest, and the only government interests sufficiently compelling

to support such restrictions are the prevention of actual or apparent quid pro quo corruption. *Id.* at 14-15, 26. These propositions have weathered the test of time.

In particular, *Buckley* struck down the expenditure limits in the Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-455 (1994)) ("FECA"), on the grounds that they "impose direct and substantial restraints on the quantity of political speech," 424 U.S. at 39, and that the asserted governmental interests were insufficient "to justify the restriction." *Id.* at 55.

In contrast, the Court upheld contribution limits. Although recognizing that contribution limits infringe the contributor's speech and associational freedoms and that larger contributions might express a greater "intensity" of support than smaller ones, the Court found that the contributor's "general expression of support for the candidate and his views . . . does not increase perceptibly with the size of his contribution." *Id.* at 21. From the perspective of candidates, it found "no indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect" on campaign funding. *Id.* at 21. Referring to "abuses uncovered after the 1972 elections," *id.* at 27 n.28, the Court concluded that the asserted compelling government interest of limiting "the actuality and appearance of corruption resulting from large individual financial contributions" justified the restriction on speech posed by the limits. *Id.* at 26.²

Following *Buckley* and its progeny, courts have uniformly struck down restrictions on political expenditures. Courts and commentators have, however, criticized *Buckley's* seemingly inconsistent approval of contribution limits. *Amici* respectfully submit that the time has come for the Court to reexamine whether a constitutionally sufficient distinction can and should exist between contributions and expenditures.

² The Court also upheld the Act's disclosure requirements as "the least restrictive means of curbing the evils of campaign ignorance and corruption . . ." *Id.* at 68.

A. *Buckley*'s Validation of Contribution Limits Created a Classic Regulatory Trap.

Campaign finance regulation has fallen prey to "the classical regulatory approach to a regulatory problem: the agency [seeks] to cure a problem caused by regulation by introducing still more comprehensive regulation." Breyer, *Regulation and Its Reform* 218 (1982). Confronted with evidence that a regulatory regime is creating perverse and unintended consequences, the regulator compounds past mistakes by adding more layers of regulation. New regulations in turn create new problems, leading to still more regulations, and so on in a vicious circle.

Campaign finance has proven especially susceptible to this regulatory trap. Faced with rapidly rising campaign costs and the falling real value of contribution limits, candidates and political parties increasingly face a choice between curtailing campaign speech or diverting time from discussion of issues to fundraising. In turn, the accelerating "money chase" prompts calls from regulation activists for more campaign finance regulation. As one group of *amici* supporting Petitioners puts it, "the campaign regulations upheld in *Buckley* are insufficient to stem the public's declining loss of faith in the democratic process." Br. for *Amici Curiae* Sen. John F. Reed *et al.*, in Supp. of Pet'rs ("Reed Br.") at 23. Some campaign reform advocates have even sought to weaken the First Amendment itself to allow greater regulation of political speech.³

Amici McConnell *et al.* strongly oppose any dilution of the Free Speech Clause. Regulation of political speech should be minimal, and, we respectfully submit, the courts must vigilantly

³ See, e.g., Bradley, Editorial, *Congress Won't Act, Will You?*, N.Y. Times, Nov. 11, 1996, at A15 (arguing *Buckley* "must be directly confronted, by amending the Constitution to make it clear that money does not equal free speech"); *Hearing on Campaign Finance Reform Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997) (testimony of Gene Karpinski, Executive Director, U.S. Public Interest Research Group) (advocating constitutional amendment allowing Congress and the states "to set limits on contributions and expenditures").

resist the regulatory trap. If even regulation advocates believe contribution limits are ineffective and counterproductive, then the time has come to reconsider the constitutionality of such limits.

B. The *Buckley* Distinction Between Contributions and Expenditures Is Illogical.

From the time *Buckley* was decided, members of this Court have questioned the distinction between contributions and expenditures. See, e.g., *Buckley*, 424 U.S. at 244 (Burger, C.J., concurring and dissenting) ("The Court's attempt to distinguish the communication inherent in political *contributions* from the speech aspects of political *expenditures* simply 'will not wash.'"); *id.* at 290 (Blackmun, J., concurring and dissenting). For instance, as Justice Thomas recently observed, the suggestion that "a contribution signals only general support for the candidate but indicates nothing about the reasons for that support" is immaterial. *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 639 (1996) (Thomas, J., concurring in the judgment and dissenting in part). A campaign poster that reads "We support candidate Smith" is as deserving of protection as one that reads "We support candidate Smith because we like his position on agriculture subsidies." *Id.* at 639-40.

Further, federal law often treats contributions and expenditures as equivalent. "Coordinated expenditures," defined as "expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate," may be deemed "in-kind contribution[s]" under federal law. 2 U.S.C. § 441a(a)(7)(B)(i) (1994). See *Colorado Republican*, 518 U.S. at 611 (Breyer, J., for plurality). FECA creates an exception from the expenditure and contribution limits for coordinated expenditures made by a party on behalf of its general election candidates. 2 U.S.C. § 441a(d)(1) (1994). These "in-kind contributions" are usually *actual speech* in the form of print or broadcast advertisements, not *money* to be used by the candidate. See *Buckley*, 424 U.S. at 21. Thus, the distinction between contributions and expenditures is illogical and ultimately unworkable.

C. Experience Shows That Contribution Limits Have a "Dramatic Adverse Impact" on Political Speech.

In *Buckley*, the Court lacked evidence that the contribution limits at issue "would have any dramatic adverse effect on the funding of campaigns and political associations." *Buckley*, 424 U.S. at 21. Based on their twenty-five years of experience with FECA's contribution limits, *amici* respectfully submit that such limits do, indeed, have a dramatic adverse effect on political speech. Revisiting the question is, therefore, appropriate. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (Court inquires "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification").

First, the Court has made clear in other contexts that the First Amendment does not provide less protection as the "intensity" of the speaker's expression increases. *See Buckley*, 424 U.S. at 21. For example, burning an American flag receives the same absolute protection as temporarily taping a peace symbol over the flag; both are expressive conduct, but of varying intensities. *Compare Texas v. Johnson*, 491 U.S. 397, 406-07 (1989) (reversing conviction for burning a flag) *with Spence v. State of Wash.*, 418 U.S. 405, 414-16 (1974) (reversing conviction for taping a peace symbol to a flag). It is no more appropriate to hold that the expression of support inherent in a \$1075 contribution is protected while the greater intensity of support reflected in a \$5000 contribution is not.

Second, contribution limits have spawned a variety of consequences. Individuals and groups constrained by such limits now provide financial support indirectly by, for instance, eschewing regulated "express advocacy" and instead funding unregulated "issue advocacy." The *Buckley* Court fully anticipated the "ingenuity and resourcefulness of persons and groups" who would "devis[e] expenditures that skirted the restrictions on express advocacy of election or defeat but nevertheless benefit[ed] the candidate's campaign." 424 U.S. at 45. *See also Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (issue advocacy by political committee is protected from regulation); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (same for issue advocacy by corporation). Thus, "soft money," decried

by regulation advocates, is often the fully anticipated consequence of the contribution limits upheld in *Buckley*.⁴ Yet, regulation advocates deem *Buckley* a "straightjacket," and now seek to regulate even protected issue speech. *See, e.g., Reed Br.* at 3.

Another result of contribution limits may be dissemination of less accurate information about candidates' positions to the voters, since candidates are able to depict their own views more accurately than supporters who are forced to act independently. Sen. Hrg. 106-19, at 65 (Lott Stmt.). Yet another consequence is that the public receives less information, since special interest groups often do not disclose the amount and sources of funding for issue advocacy. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353-57 (1995).

Third, contribution limits hamper candidates' ability to campaign. Consistent with Mr. Fredman's affidavit, Joint Appendix ("JA") 21-23, recent anecdotal evidence shows that the federal contribution limit is hampering candidate fundraising, and is deterring qualified candidates from seeking election or reelection. Former Senator Dan Coats recently testified that the "chore of raising money under the current [\$1000 federal] contribution limits" was "one of the most important reasons" he decided not to run for reelection in 1998. Sen. Hrg. 106-19, at 20 (Coats Stmt.). Senator John Kerry announced in February 1999 that he would not run for president in 2000, citing the difficulty of raising adequate funds. *Id.* at 88. Senator Frank Lautenberg cited the pressure of and time consumed by fundraising as the reasons he chose not to run for a fourth term in 2000. *Id.* Senators Simon and DeConcini also stated that the fundraising burden was pivotal in their decisions not to seek reelection. *Id.* Senators Bumpers, Ford, and Glenn all chose not to run for fourth terms, citing

⁴ *See Campaign Contribution Limits: Hearing Before the Comm. on Rules and Admin.* ("Sen. Hrg. 106-19"), 106th Cong. 65 (1999) (statement of John Lott, Professor, Univ. of Chicago School of Law); *see also id.* at 24-25 (statement of Dan Coats, former U.S. Senator) ("With nowhere else to go, these potential hard money contributors have turned their money into soft dollars that finance issue advertisements.").

fundraising concerns. Eagleton, *Why Class of '74 Exits the Senate*, St. Louis Post-Dispatch, Nov. 16, 1997, at B3.

In an article advocating campaign expenditure limits, Professor Vincent Blasi explained that this "money chase" is a direct consequence of political contribution limits:

The recent increase in time devoted to fund-raising did not evolve 'naturally.' Rather, it developed in response to the patchwork legislative scheme that was left standing after the selective invalidations of *Buckley v. Valeo*: no limits on overall spending, severe limits on the size of contributions, and no limits on independent expenditures for and against particular candidates. The war chest mentality was born of this regulatory residue. Had the 1974 campaign finance law at issue in *Buckley* either never been passed or been upheld in its entirety, the quest for contributions would look very different. Almost certainly, it would be far less time consuming because either candidates would not seek to raise so much money (if they couldn't spend beyond a set limit) or they could raise it much more efficiently (by means of large contributions).

Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1307-08 (1994). Professor Blasi's call for greater regulation through unconstitutional spending limits is a regulator's classic response to a regulatory failure. A more rational response, we respectfully submit, would be to accord contributions full First Amendment protection.

Fourth, contribution limits do not reduce concerns about corruption. As shown below (pp. 18-25), concerns about actual or apparent corruption associated with contributions are seriously overstated. But even if such fears were justified, contribution limits would not effectively address them. As campaigns become more expensive, candidates rely on networks of fundraisers, each of whom commits to raise \$10,000, \$50,000, or even \$100,000 in amounts allowed by the contribution limit. These individuals are,

in turn, as much appreciated by the candidates as they would be if they had personally contributed the same amount of money.

Finally, empirical studies show that contribution limits reduce the competitiveness of political races by disproportionately harming challengers. Sen. Hrg. 106-19, at 67 (Lott Stmt.). Past investments by incumbents in advertising create "brand name recognition" that challengers lack.⁵ The challenger's disadvantage is compounded by the perquisites of incumbency, which include media coverage of officeholders, the franking privilege, and well-organized networks of volunteers that typically attach to officeholders. *Id.* at 66-67. A recent study cited by amici supporting Petitioners concluded that challengers face "formidable obstacles" in the political arena and that, while incumbent spending "clearly affects" election outcomes, "the most important consideration is whether a challenger can raise enough money to finance a viable campaign."⁶

The record developed before the Senate Rules Committee in March 1999 confirms this point. In the 1998 general election for Virginia's 8th District seat in Congress, Demaris Miller faced a three-term incumbent with over \$700,000 in the bank, most of which had been carried over from previous elections. Sen. Hrg. 106-19, at 33-34 (statement of Demaris H. Miller, candidate for Congress in 1998). The contribution limits forced her to turn away a number of large checks; she then lacked funding to purchase any advertising on broadcast television. *Id.* at 29, 33. When voters came to the polls in November, many asked "[w]ho is this Miller fellow and what does he stand for?" *Id.* at 28 (emphasis added). In short, Mrs. Miller had been unable to

⁵ See Lott, *The Effect of Nontransferable Property Rights on the Efficiency of Political Markets*, 32 J. Pub. Econ. 231 (1987); see also Lott, *Explaining Challengers' Campaign Expenditures: The Importance of Sunk Nontransferable Brand Name*, 17 Pub. Fin. Q. 108 (1989).

⁶ Committee for Econ. Dev., *Investing in the People's Business: A Business Proposal for Campaign Finance Reform* 17 (1999), cited in Br. of Amici Curiae Paul Allen Beck et al. ("Beck Br.") at 21; Br. of Amicus Curiae Public Citizen ("Public Citizen Br.") at 13.

convey even basic information about herself – such as her gender – to the electorate.

II. CONTRIBUTION LIMITS MUST BE SUBJECTED TO STRICT SCRUTINY.

Even if the distinction between contribution limits and expenditure limits is allowed to stand, contribution limits must be subject to strict scrutiny. Implicitly recognizing that the Missouri contribution limit will fail if subjected to strict scrutiny, Petitioners and *amici* supporting them argue that contribution limits are subject to “intermediate” rather than “strict” scrutiny. *See, e.g.,* Petitioners’ Br. (“Pet. Br.”) at 13-23. One *amicus* concedes that “intermediate scrutiny” would require “line-drawing of a kind not often permitted in First Amendment jurisprudence.” Public Citizen Br. at 21 (emphasis added). In fact, since *Buckley* this Court has never used a standard less rigorous than strict scrutiny when reviewing a campaign finance regulation.

A. In *Buckley* and in Subsequent Decisions, the Court Has Applied Strict Scrutiny to Contribution Limits.

Buckley emphasized that both “contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.” *Buckley*, 424 U.S. at 14 (emphasis added). Accordingly, the *Buckley* Court applied strict scrutiny in all aspects of its review of FECA. This was clearly true for expenditure limits, which “place[d] substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.” *Id.* at 58-59. Even when reviewing disclosure requirements, which “appear to be the least restrictive means of curbing the evils” in the campaign finance system, the Court applied “exacting scrutiny.” *Id.* at 68, 64. *See also Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636, 647 (1999).

Buckley also recognized that contribution limits “would have a severe impact” on the candidate’s speech “if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.” *Buckley*, 424 U.S. at 21. *Buckley* held that contribution limits also restrict the contributor’s rights of speech and association, and that such an

interference “may be sustained if the State demonstrates a sufficiently *important interest* and employs *means closely drawn* to avoid unnecessary abridgment of associational freedoms.” *Id.* at 25 (emphasis added).⁷ The *Buckley* Court upheld the contribution limits only after applying “the rigorous standard of review established by our prior decisions.” *Id.* at 29 (emphasis added).

The Court’s subsequent campaign finance decisions have *always* applied strict scrutiny.⁸ Likewise, numerous recent lower federal and state court decisions assessing the constitutionality of contribution limits have recognized that contribution limits are subject to strict scrutiny.⁹

B. For Important Policy Reasons, Strict Scrutiny Is Appropriate When Reviewing Contribution Limits.

Even if the Court were inclined to reconsider the level of scrutiny used for contribution limits, it should, we respectfully submit, continue to apply strict scrutiny. *First*, and most

⁷ Each of the decisions cited by *Buckley* for this proposition struck down a state statute using what is now considered strict scrutiny. *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975) (“interest of the state must be compelling”); *NAACP v. Button*, 371 U.S. 415, 433, 438 (1963) (requiring “narrow specificity” and “compelling state interest”); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (“comprehensive interference with associational freedoms goes far beyond what might be justified” by the state’s interest).

⁸ *See, e.g., Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990) (“narrowly tailored to serve a compelling state interest”); *Federal Election Comm’n v. National Conservative Political Action Comm. (“NCPAC”)*, 470 U.S. 480, 496-97 (1985) (“full First Amendment protection”); *Citizens Against Rent Control*, 454 U.S. at 294 (“exacting judicial review”); *Bellotti*, 435 U.S. at 786 (“exacting scrutiny”).

⁹ *See, e.g., North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 718 (4th Cir. 1999) (striking contribution limit); *Russell v. Burris*, 146 F.3d 563, 572 (8th Cir.) (same), *cert. denied*, 119 S. Ct. 510 (1998); *Carver v. Nixon*, 72 F.3d 633, 636 (8th Cir. 1995) (same), *cert. denied*, 578 U.S. 1033 (1996); *Arkansas Right to Life State Political Action Comm. v. Butler*, 29 F. Supp. 2d 540, 553 (W.D. Ark. 1998) (same), *cert. denied*, 119 S. Ct. 1041 (1999); *see also State v. Alaska Civil Liberties Union*, 1999 WL 219443, at *32 (Alaska 1999) (sustaining contribution limit).

important, strict scrutiny assures that the limits were enacted to serve a valid government purpose. Mechanical post hoc recitations of an acceptable justification cannot immunize legislation from effective judicial review. Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (striking ordinance designed to reach religious animal sacrifices performed by a particular church); *Grosjean v. American Press Co.*, 297 U.S. 233, 251 (1936) (striking tax designed to punish newspapers opposing Huey Long).

Despite stirring rhetoric about the “appearance of corruption,” contribution limits are often enacted for improper reasons. The Brennan Center for Justice, an ardent advocate of campaign finance regulation that represents Intervenor Joan Bray here, recently published a primer for such regulation at the state level. It concedes:

Goals that galvanize reformers and voters may not necessarily be the purposes accepted by the Supreme Court. *Focus groups tend to report high positive responses to statutes aimed at ‘leveling the playing field,’ while Buckley rejected in no uncertain terms Congress’s effort to limit spending by monied interests to enhance the relative voice of others. . . . To promote survival of bills or initiatives, market research may therefore have to take a back seat to the law, when drafters formulate legislative purposes.*¹⁰

The Court has unequivocally rejected “leveling the playing field” and “reducing political spending” as permissible justifications for campaign finance regulations, writing that such

¹⁰ Brennan Center for Justice, *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws* II-4 (Goldberg ed., 1998) (emphasis added). See also Center for Responsive Politics, *Reform: Principles, Problems and Proposals* (visited June 2, 1999) <www.opensecrets.org/pubs/reform/reform1.htm> (“anti-democratic” to permit private money to finance elections); Raskin & Bonifax, *The Wealth Primary: Campaign Fundraising and the Constitution* (visited June 2, 1999) <www.opensecrets.org/pubs/law/wp/wealth06.htm> (same).

concerns are “wholly foreign to the First Amendment.” *Buckley*, 424 U.S. at 48-49; see also *Bellotti*, 435 U.S. at 790-91. Since regulation advocates often recite “the appearance of corruption” to mask these illegitimate goals, strict scrutiny of contribution limits by the courts is vital to assure that such limits are not adopted for illegitimate reasons. Thus, a federal court used strict scrutiny in striking down Missouri’s campaign finance referendum, finding “no evidence in the record identifying . . . the reasons for the particular dollar limits.” *Carver*, 72 F.3d at 644. See also *Russell v. Burris*, 978 F. Supp. 1211, 1227-28 (E.D. Ark. 1997) (literature supporting amendment to Arkansas contribution limits urged adoption “to level the playing field”), *aff’d in part, rev’d in part*, 146 F.3d 563 (8th Cir.), *cert. denied*, 119 S. Ct. 510 (1998).

Second, legislatively enacted contribution limits should be subjected to strict scrutiny because they tend to favor incumbents over challengers (see pp. 9-10 above) and are therefore especially likely to reflect incumbent “self-dealing.” Contribution limits thus raise “the special spectre of governmental efforts to promote the interests of existing legislators. Indeed, it is hard to imagine other kinds of legislation posing similarly severe risks.” Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L. Rev. 1390, 1400 (1994); see also Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 Ann. Surv. Am. L. 373, 386 (“[L]egislatures do not fail to adopt campaign finance legislation. Instead, they adopt incumbent-favoring campaign finance legislation.”). Legislators are able to enact such legislation while *appearing* to respond to the preferences of voters who favor “campaign finance reform.” Thus, the pro-incumbent effect of contribution limits may not be readily apparent to voters. The entrenchment problem is still more pronounced when legislative inaction allows escalating campaign costs to erode real contribution limits over time.

Third, even if contributions are indirect or “symbolic” speech, Pet. Br. at 15, strict scrutiny is appropriate. Decisions of this Court make clear that symbolic political speech receives *full* First Amendment protection. In *Texas v. Johnson*, for instance, the Court reversed a conviction under Texas’ flag desecration statute, noting the “expressive overtly political nature” of the defendant’s burning of the American flag and applying “the most

exacting scrutiny.” 491 U.S. at 406, 412.¹¹ First Amendment interests in contributions are especially pronounced because both the contributor and the recipient have speech and associational interests at stake.

III. THE STATE’S FACTUAL SHOWING IS INSUFFICIENT TO SUSTAIN THE LIMIT.

A. Summary Judgment Requires an Absence of Disputed Material Facts.

To obtain summary judgment, the moving party must prove the absence of a genuine dispute about material facts and must prove its entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The district court in this case entered summary judgment for Petitioners. As required, the Eighth Circuit conducted “an independent examination of the record as a whole, without deference to the trial court.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Groups of Boston, Inc.*, 515 U.S. 557, 567 (1995). The Eighth Circuit agreed with the district court that the material facts were undisputed, but disagreed with the application of the law to those facts and reversed and remanded the case to the district court with instructions to enter summary judgment, instead, for Respondents. *Amici* submit that the Eighth Circuit’s decision for Respondents was correct as a matter of law.

B. Respondents Proved That the Missouri Contribution Limit Constrains Political Speech.

Respondents presented undisputed evidence that the Missouri contribution limit had a significant adverse effect on Mr. Fredman’s campaign for State Auditor. Mr. Fredman was a first-time candidate for statewide office and lacked his opponents’

¹¹ See also *United States v. Eichman*, 496 U.S. 310 (1990) (applying “exacting scrutiny” to strike down Flag Protection Act); *Spence v. State of Wash.*, 418 U.S. 405 (1974) (taping of peace symbol to flag to protest invasion of Cambodia and killings at Kent State); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (students wearing armbands to protest American military involvement in Vietnam).

“vast network of political contacts” and “well established base of contributors.” Fredman Aff. ¶ 9, JA 23. Nor was he able to raise the “seed money” necessary to gain visibility early in the campaign. *Id.* The Shrink Missouri Government PAC was ready, willing, and able to contribute to Mr. Fredman in excess of the contribution limit. ShrinkPAC Aff. ¶ 7, JA 28. The contribution limits prevented Mr. Fredman from marshalling sufficient assets to conduct a meaningful campaign. Fredman Aff. ¶ 4, JA 22.

Petitioners cannot rebut these facts by merely invoking the Court’s approval of a \$1000 limit twenty-three years ago in *Buckley*. To begin with, it costs a great deal more to raise money in small than in large amounts. A single visit or telephone call to obtain a \$10,000 donation must be replaced by at least ten visits or phone calls. The costs of postage, printing, donor lists, and fundraising personnel have risen to the point where one-half or even more of the amount raised may be consumed in fundraising costs. See p.28 below. Thus, the “net” amount available for speech may be a fraction of the gross amount raised.

The value of these net proceeds has also seriously eroded. The \$1000 contribution limit passed by Congress in 1974 is now worth only \$302; an equivalent amount in today’s purchasing power would be \$3306.¹² In some sectors of the economy, prices have increased even more rapidly. For example, in 1975, a reserved seat at the World Series cost \$10; in 1998, it cost \$100.¹³ A new Ford Mustang cost \$2700 but today costs \$24,000.¹⁴ See

¹² See Sen. Hrg. 106-19, at 14 (Coats Stmt.) (citing Consumer Price Index in 1974 and 1998).

¹³ Compare *If You Wonder What Next Year’s Prices Will Be Like*, U.S. News & World Rep., Oct. 11, 1976, at 57, with *Cops Watching For Series Scalpers*, AP Online, Oct. 16, 1998, available in LEXIS, News Library, Cumwv File.

¹⁴ Compare McConnell, *The Money Gag: Efforts to Limit Campaign Spending Are Back, with Less Justification Than Ever*, Nat’l Rev., June 30, 1997, at 36, with Kiplinger’s Personal Finance Magazine, 1999 Price Watch: *What Three New Convertibles Will Cost* (visited June 2, 1999) <www.kiplinger.com/magazine/archives/1998/November/ycnov985.htm>.

generally Engle et al., *Buckley Over Time: A New Problem with Old Contribution Limits*, 24 J. Legis. 207 (1998).

Political campaigns are one such sector. Witnesses before the Senate Rules Committee in March 1999, including John Lott, Professor of Law and Economics at the University of Chicago, and Karen Sheridan, Executive Vice President of one of the oldest and largest media management companies in the Midwest, testified that the costs of campaigning have increased since 1976 much faster than inflation. See also Sabato, *Real and Imagined Corruption in Campaign Financing, in Elections American Style* 155, 158 (Reichley ed., 1987). Moreover, the voting population has increased 42 percent since 1974, so there are more voters to reach. Sen. Hrg. 106-19, at 15 (Coats Stmt.). If adjusted for the Consumer Price Index and growth of voting-age population, the \$1000 limit would have grown to approximately \$4600. *Id.* at 87.¹⁵

The television production costs for political advertising have grown more rapidly than the price index. To compete for viewer attention with increasingly "glitzy" commercial advertisements, political advertisements have become more sophisticated and thus more expensive to produce. *Id.* at 15 (Coats Stmt.). The average cost to produce a 30-second spot was \$4000 to \$8000 in 1975, but \$22,000 to \$28,000 in 1999. *Id.* at 52 (Sheridan Stmt.). Moreover, candidates must now design and produce multiple advertisements to appeal to separate voting groups. *Id.* at 53.

Likewise, the cost on a per-viewer basis to air a political advertisement is much higher now than in 1976. The average number of television channels received per household rose from 7.1 in the 1970s to 50.8 in 1999. *Id.* at 56-57 (Sheridan Stmt.). The resulting viewer fragmentation has significantly increased the cost of reaching the same number of voters. The average cost per minute to reach 1000 viewers during prime time has risen from

¹⁵ Whenever Congress imposed spending limits, it required adjustment for both inflation and voting-age population. See 2 U.S.C. § 441a(d)(2), (3) (1994) (coordinated expenditure limits for parties based on voting-age population); *id.* § 441a(c) (1994) (also adjusting coordinated expenditure limits for inflation).

\$3.65 in 1975 to \$15.50 in 1999. *Id.* The average cost per minute to reach 1000 viewers during the local late news rose from \$2.50 in 1975 to \$12.85 in 1998. *Id.* See also *id.* at 81 (Ex. 1 to Coats Stmt.) (chart showing increased cost to reach 1000 households from 1974 to 1997). The number of television households rose from 69.6 million in 1975 to 99.4 million in 1999; the number of adults in those households increased from 140.7 million in 1975 to 195 million in 1999; and the number of weekly viewing hours in each household rose from 43.7 in 1974 to 50.4 in 1997. *Id.* at 56-57 (Sheridan Stmt.). Getting a political message heard is an ever more expensive challenge.

As the real value of \$1000 has declined, the potential for corruption posed by contributions greater than \$1000 has virtually vanished. In the 1980 race for Missouri's United States Senate seat, the Democratic candidate spent almost \$1.4 million, compared to almost \$1.2 million by the Republican candidate. *Id.* at 83 (Ex. 2 to Coats Stmt.). A \$1000 contribution then constituted .07 percent of the Democrat's funding, and .08 percent of the Republican's. Three elections later in 1998, the Democratic candidate for the very same Senate seat spent just under \$2.7 million, and the successful incumbent Republican spent \$6.2 million, of which a \$1000 contribution constituted just .03 percent and 0.016 percent of their funding. *Id.* at 85 (Ex. 3). It is difficult to see how a contribution ten or even fifty times higher could have a reasonable prospect of corrupting these candidates.

Similarly, the record in this case indicates that a \$1000 contribution to the 1996 Democratic gubernatorial candidate constituted only .04 percent of his funding, and .15 percent for the Republican; .1 percent for the Democratic candidate for Secretary of State, and .15 percent for the Republican; .3 percent for the Democratic candidate for State Treasurer, 2.5 percent for the Republican; .17 percent for Petitioner Nixon in his successful campaign for Attorney General, and .6 percent for his Republican opponent. Ex. A to Aff. of Joseph E. Carroll, JA 58.

In short, both the real value and any salutary effect of the contribution limit sustained in *Buckley* has so eroded that *Buckley* can no longer be credibly cited as support for a \$1000 limit.

C. The Record Evidence Submitted by the State Was Insufficient To Justify Any Infringement of Speech.

The only compelling interests that have been identified by this Court as adequate to support a contribution limit are the prevention of *actual* or *apparent* quid pro quo corruption. *NCPAC*, 470 U.S. at 496-97. The State proved neither.

1. There Is No Claim of Actual Corruption.

Petitioners do not claim the existence of actual quid pro quo corruption in Missouri. See Pet. Br. at 35 (“[T]he contribution limits were enacted to address a public *perception* that legislative votes or executive actions were being purchased with campaign contributions.”) (emphasis added). Nor could they. Like the federal government, Missouri has criminalized bribery of elected officials as well as other similar devices.¹⁶

Twenty-five years of sophisticated economic, public policy, and social science literature shows *overwhelmingly* that legislative voting is driven by personal ideology, constituent desires, and party loyalty, *not* political contributions.¹⁷ As Professor Sorauf wrote in 1988 after canvassing the extant empirical literature, “there simply are no data in the systematic studies that would support the popular assertions about the

¹⁶ Compare *United States v. Sun-Diamond Growers of Cal.*, 119 S. Ct. 1402, 1408-09 (1999) with, e.g., Mo. Const. Art. VII, § 1 (impeachment of elected executive officials and judges for corruption); Mo. Ann. Stat. § 56.350 (West 1999) (fee for signing pardon deemed bribery); § 104.500 (compensation to influence trustee or employee of a state employee retirement system deemed bribery); § 217.120 (gifts from prisoners to corrections officers deemed bribery); § 576.010 (bribery of a public servant). Anecdotal, hearsay reports of quid pro quo corruption are either equivocal or prosecutable under other statutes. See, e.g., Br. *Amicus Curiae* of the Secretaries of State of Ark. *et al.* (“Secretaries’ Br.”) at 5 n.5.

¹⁷ See Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 679 (1997); Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo. L. J. 45, 58-59 (1997); Moussalli, *Campaign Finance Reform: The Case for Deregulation* (Madison Paper No. 5, 1990); Sorauf, *Money in American Elections* 307-17 (1988); Sabato, *supra*, at 160.

‘buying’ of Congress or about any other massive influence of money on the legislative process.”¹⁸

2. An “Appearance of Corruption” Cannot Justify Restrictions on Core Speech.

The “appearance of corruption,” standing alone, is far too vague a standard upon which to uphold a restriction on core political speech. A similar standard, the “appearance of impropriety,” embodied in Canon 9 of the 1969 ABA Code of Professional Responsibility, was repudiated in the 1983 ABA Model Rules of Professional Conduct. While in effect, it was widely criticized as being “too vague a phrase to be useful,” ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975), “simply too dangerous and vague,” Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 Minn. L. Rev. 243, 265 (1980), and “unpredictab[le],” Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 261 (3d ed. 1992).¹⁹

The inherent vagueness of the appearance of impropriety standard arose in part because it was never clear from whose perspective the appearance should be judged. Some courts chose the vantage point of the “the public,” others chose “all reasonable

¹⁸ Sorauf, *supra*, at 312. See, e.g., Sen. Hrg. 106-19, at 66-67 (Lott Stmt.); Bronars & Lott, *Do Campaign Donations Alter How A Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J.L. & Econ. 317 (1997); Wright, *Contributions, Lobbying, and Committee Voting in the U.S. House of Representatives*, 84 Am. Pol. Sci. Rev. 417 (1990); Forman, *PAC Contributions and Effective Corporate Tax Rates: An Empirical Study*, 5 Akron Tax J. 65 (1988); Lott, *Political Cheating*, 52 Pub. Choice 169 (1987); Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 Am. Pol. Sci. Rev. 400 (1985); Chappell, *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 Rev. Econ. & Stats. 77 (1982); Welch, *Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports*, 55 W. Pol. Q. 478 (1982).

¹⁹ See also *Gregori v. Bank of America*, 254 Cal. Rptr. 853, 862 (Ct. App. 1989) (“too imprecise to furnish a reliable judicial guideline.”); Wolfram, *Modern Legal Ethics* 320 (West 1986) (“subjective”); *Adoption of Erica*, 686 N.E.2d 967, 973 (Mass. 1997) (“nebulous standard that has been rejected by most courts”).

persons,” and in either case “the task of guessing at what those groups might hold in their minds [was] extremely speculative.” Wolfram, *supra*, at 320. In an attempt to salvage the standard, the Fifth Circuit held that “there must be at least a reasonable possibility that some specifically identifiable impropriety *did in fact occur*” because “a lawyer need not ‘yield to every imagined charge of conflict of interest, regardless of the merits, so long as there is a member of the public who believes it.’” *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (emphasis added). Critics also noted that “[w]hat lay persons sometimes perceive as impropriety is frequently in the highest tradition of the bar.” Kramer, *supra*, at 265.²⁰

Like the “appearance of impropriety” standard, the “appearance of corruption” standard, in the absence of any claim of *actual* corruption, is too vague a foundation upon which to base a restriction on core political speech. Speech should not be regulated based on the misperceptions of the general public. *Cf. Butler v. Michigan*, 352 U.S. 380 (1957) (state may not reduce the adult population to reading only what is fit for children).

This is especially true when dealing with the First Amendment, which serves as a bulwark against majorities – even overwhelming majorities – enacting laws that suppress the speech, associational, or religious rights of individuals. As but one example, the Court deemed irrelevant a purported “national consensus” opposing flag desecration and twice struck down laws prohibiting the symbolic speech of flag burning. *Eichman*, 496 U.S. at 318; *Texas v. Johnson*, 491 U.S. at 420. Polls cannot override the First Amendment.²¹

²⁰ A federal judge is subject to disqualification in any proceeding “in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a) (1994). This statutory standard differs from the “appearance of impropriety” and “appearance of corruption” standards in many respects, foremost that it is an objective standard to be evaluated in each case based on known facts.

²¹ The 1798 Alien and Sedition Act banned speech “insulting” to the government. It imposed fines and imprisonment on “any person [who] shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the

In any event, this Court has *never* sustained a contribution or expenditure limit solely on a showing of the “appearance of corruption.” In *Buckley*, the legislative history of FECA, *see, e.g.*, S. Rep. No. 93-689 (1974), and the court record, *see* 519 F.2d 821, 835-40 (D.C. Cir. 1975), *aff’d in part, rev’d in part*, 424 U.S. 1 (1976), contained evidence relating to *actual* exchanges of money for government action. The First Amendment requires that “[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion by Kennedy, J.).²² It “must demonstrate that the recited harms are *real*, . . . and that the regulation *will in fact alleviate these harms* in a direct and material way.” *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1994) (emphasis added). *See also NCPAC*, 470 U.S. at 498 (invalidating independent expenditure limit where corruption “remain[ed] a hypothetical possibility and nothing more”). Longstanding First Amendment principles would suffer if a state were allowed to suppress core political speech based on an unfounded public perception of corruption.²³

President . . . [or] to bring them . . . into contempt or disrepute.” Act of July 14, 1798, ch. 74, 1 Stat. 596. A basic premise of First Amendment jurisprudence is that the Act was unconstitutional. *See generally New York Times v. Sullivan*, 376 U.S. 254, 273-76 (1964) (discussing Alien and Sedition Act); Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 121-30 (1984).

²² In *Colorado Republican*, six members of the Court expressly adopted for the campaign finance context Justice Kennedy’s statement for the plurality in *Turner* that the government must show that speech regulations address a *real* harm. *See* 518 U.S. at 618 (O’Connor, J., Souter & Breyer, JJ.); 518 U.S. at 647 (Rehnquist, C.J., Scalia & Thomas, JJ) (concurring in the judgment and dissenting in part).

²³ *Cf. Bridges v. California*, 314 U.S. 252, 263 (1941) (“[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.”); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (The Court must determine whether or not “the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils . . .”).

3. The State Failed To Prove Even "an Appearance of Corruption."

The evidence submitted by the State of Missouri to support its claim of an "appearance of corruption" is weak indeed. The record contains only two items purporting to prove an "appearance of corruption" in Missouri. The first is a three-page affidavit of Missouri Senator Wayne Goode, chairman of the Interim Joint Committee on Campaign Finance Reform. Citing no specifics, Senator Goode averred that his committee "heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence." Goode Aff. ¶ 8, JA 129. Goode asserted that he "believe[s]" that contributions over those limits have the appearance of buying votes as well as the real potential to buy votes." *Id.* ¶ 9, JA 129 (emphasis added).

The second item, a two-page affidavit by John W. Maupin, former Chairman of the Missouri Ethics Commission, states that "Missouri needed the campaign contribution limits to counter the *blatant cynicism among the populace* that the large contributions by a few contributors curried favor with Missouri elected officials." He opined that "the perception of corruption in our government has definitely improved [*sic*] as a result of the campaign contribution limits." *Id.* ¶¶ 4, 5, JA 131-32 (emphasis added).

Neither affidavit alludes to any actual incidents of political contributions appearing to buy votes, nor does either cite facts to substantiate the beliefs espoused. Neither affidavit would seem to be admissible as expert testimony. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The district court also cited newspaper articles purportedly pointing to an "appearance of corruption." Even if this hearsay were considered probative evidence sufficient for a Rule 56 ruling, examination of these articles rebuts any such inference. One article reported a \$20,000 contribution to a candidate for state treasurer who, once in office, awarded the contributor a substantial portion of the State's banking business. The very same article concludes, "Central Trust Bank appears to have won the contest fair and square." Editorial, *The Central Issue is Trust*, St. Louis

Post-Dispatch, Dec. 31, 1993, at 6C. The other article reports that a candidate for state auditor received \$40,000 from a brewery and \$20,000 from a bank; it does not suggest that the candidate planned to take any official actions that would benefit the contributors. Mannies, *Auditor Race May Get Too Noisy to Be Ignored*, St. Louis Post-Dispatch, Sept. 11, 1994, at 4B.

Next, the State suggests that the 1994 passage of a voter referendum in Missouri limiting contributions proves a "perception" of corruption in Missouri. Pet. Br. at 4, 34. Nothing in the text of Proposition A discloses the reasons underlying it. See *Carver*, 72 F.3d at 634 n.1 (quoting Proposition A). Indeed, letters to the editor supporting Proposition A,²⁴ newspaper editorials supporting it,²⁵ statements of its sponsor,²⁶ and post-election analyses²⁷ indicate that Missouri voters were motivated to adopt Proposition A by illegitimate concerns. The Eighth Circuit properly held the Proposition offensive to the First Amendment. 72 F.3d at 645.

²⁴ See, e.g., *Letters*, St. Louis Post-Dispatch, Nov. 5, 1994, at 15B (Proposition A would "encourage more neighbor-to-neighbor campaigns"); *Letters*, St. Louis Post-Dispatch, Oct. 16, 1994, at 2B ("If you, like 90 percent of Missourians, believe that *there is too much money in politics*, vote yes on Proposition A.") (emphasis added).

²⁵ See, e.g., Editorial, *Four Proposals on the Missouri Ballot*, St. Louis Post-Dispatch, Oct. 20, 1994, at 6B ("Proposition A . . . is a grassroots effort to drive big money out of state politics."); *Proposition A Seeks Cap On Campaign Aid*, St. Louis Post-Dispatch, Nov. 6, 1994, at 8 ("Supporters say these changes will make the electoral process more democratic and make officeholders more accountable.").

²⁶ See, e.g., Mannies, *Limits on Campaign Funding May Create 'Big Mess' for '96*, St. Louis Post-Dispatch, Nov. 10, 1994, at 5B ("public financing of campaigns" was ACORN's objective in proposing the measure).

²⁷ See, e.g., Editorial, *Proposition A, Round 2*, St. Louis Post-Dispatch, Jan. 7, 1995, at 10B ("[V]oters . . . want *less spending by politicians* and much less money in political campaigns.") (emphasis added); Murphy, *Low-Key Proposition A Would Refashion Election Financing*, Kansas City Star, Oct. 27, 1994, at A1 ("more level playing field at election time.").

Even if (contrary to settled law) public opinion could support restrictions on core political speech, public opinion polls undermine the notion that the public perceives a serious threat of corruption from political contributions. A Princeton survey sponsored by the Center for Responsive Politics, a campaign reform group, and relied upon by *amici* supporting Petitioners (Secretaries' Br. at 15) is illustrative.²⁸ Only twelve percent of respondents answered as many as three of five rudimentary campaign finance questions correctly, and only four percent were aware that corporations are prohibited from contributing to presidential campaigns. See *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 1999 WL 86840 (D. Colo. 1999) at *16 ("the public is unaware of the nuances of campaign financing"). With regard to the "appearance of corruption," only 17 percent believed that it "looks like" a contributor is "trying to buy special favors" if he contributes an amount below \$20,000, and only one third of the respondents were suspicious at contribution levels below \$50,000. In other words, only if a contribution exceeds the Missouri limit by at least *forty-fold* would it look like a quid pro quo to a majority of the public. Notably, 47 percent of all respondents favored removing *all* limits on campaign contributions, "provided that campaigns make known who donated money and how much they donated." This survey rebuts any "public perception of corruption."²⁹

²⁸ The web site of the Center for Responsive Politics summarizes this 1997 survey. See *Money and Politics Survey* (visited May 26, 1999) <www.opensecrets.org/pubs/survey/s3.htm>. Complete poll results are available in LEXIS, News Library, Arcnws File.

²⁹ See Survey Questions 22-24, 17-18, 31(1). Polls consistently indicate that campaign finance reform is a very low priority for American voters. See *Wall St. J./NBC News Poll*, Wall St. J., Jan. 23, 1998, at A1 (more than 50 percent of respondents consider high priorities to include a balanced budget, Social Security, federal support for education, and taxes; campaign finance reform "can wait"); Rothberg, *Campaign Finance Reform Gets Yawn: An AP News Analysis*, AP Online, June 29, 1998, available in LEXIS, News Library, Curnws File (polling in June 1998 indicated campaign finance was a "recessed issue" and "rarely mentioned"); see also Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 Conn. L. Rev. 831,

The steady decline in taxpayer participation in the "public funding" of presidential campaigns further suggests the average American is not concerned about corruption in the campaign finance system. Each year, every taxpayer is allowed to designate \$3 of his tax payment, at no cost to himself, to provide public funding for presidential campaigns and national party conventions. Taxpayer participation has steadily declined from a high of 28.7 percent in 1980 to 12.2 percent in 1998. See Federal Election Comm'n, *Presidential Fund Income Tax Check-Off Status* (Jan. 1999); Herman, *Tax Report*, Wall St. J., Apr. 29, 1998, at A1. Participation in public funding at the state level is also declining. For example, in Idaho, participation declined from 18.3 percent (in 1980 or in the earliest year for which data is available) to 6.6 percent in 1994; in New Jersey, from 41.7 percent to 22.7 percent; and in Rhode Island, from 22.0 percent to 6.0 percent. Malbin & Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 67 (1998).

4. "Access" Is Not Corruption or Even the Appearance of Corruption.

Petitioners and their *amici* advocate an even more lenient test than the appearance of corruption standard. They argue that mere "access" by contributors to officeholders, regardless of any actual effect on decision making, is sufficient to prove an "appearance of corruption." "Access" to lawmakers is itself a right protected by the First Amendment, which prohibits restrictions on the right "to petition the Government for a redress of grievances." Neither FECA nor the Missouri statute prohibits candidates and officeholders from using personal solicitation – in person, by telephone, at fundraising receptions and dinners – to raise campaign contributions, and any attempt to do so would raise grave constitutional issues.

Significantly, persons and entities seeking "access" to government officials spend far greater amounts of money on

833-36 (1998) (discussing a 1996 Tarrance Group Poll and a 1996 Harwood Group Poll).

lobbying than on campaign contributions. For just calendar year 1997, the Center for Responsive Politics reported total federal lobbying expenditures of \$1.26 billion, more than was spent on *all federal electoral activity* during the two-year 1997-1998 election cycle.³⁰ The top ten donors of so-called "soft money" gave \$12,002,390 to the national political parties during the 1997-1998 election cycle, whereas those same ten companies spent \$104,176,042.75 on lobbying during that same period.³¹ As Professor Paul Herrnson, an expert for the FEC in pending litigation, correctly notes, "[t]he lobbying efforts that groups make have a greater effect on members' voting decisions than their campaign contributions."³²

More fundamentally, attempts to equate "access" with quid pro quo corruption trivialize the offense of bribery. In *Sun-Diamond Growers*, this Court held that, to prove a violation of the gratuity statute, the government must prove an *actual link* between a thing of value given to a federal official and a specific "official act" in return. 119 S. Ct. at 1411. The Court pointed out the "absurdities" of criminalizing "a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his

³⁰ Center for Responsive Politics, *Influence Inc.: Summary* (visited May 27, 1999) <www.opensecrets.org/pubs/lobby98/summary.htm>; Federal Election Comm'n, *FEC Reports on Congressional Fundraising for 1997-98* (visited May 27, 1999) <www.fec.gov/press/canye98.htm>; Federal Election Comm'n, *FEC Reports on Political Party Activity for 1997-98* (visited May 27, 1999) <www.fec.gov/press/ptyye98.htm>.

³¹ According to the Center for Responsive Politics, Philip Morris, Amway, American Financial Group, MCI Worldcom, RJR Nabisco, AT&T, Loral Spacecom, Federal Express, Bell Atlantic, and Freddie Mac gave a total of \$12,002,390 in "soft money" during the 1997-98 cycle. See Center for Responsive Politics, *Soft Money Search* (visited June 3, 1999) <www.opensecrets.org/parties/softsearch.htm>. Form LD-2s filed by those same corporations and available at the Legislative Resource Center indicate they spent \$104,176,042.75 on federal or, in five cases, federal and state, lobbying during that same cycle.

³² Herrnson, *Congressional Elections: Campaigning at Home and in Washington* 239 (2d ed. 1998). Herrnson is the FEC's expert in *Republican Nat'l Comm. v. Federal Election Comm'n*, Civ. No. 98-CV-1207 (D.D.C.).

office, on the occasion of the latter's visit to the school." *Id.* at 1407-08. Likewise, a campaign contribution in exchange for attending the candidate's fundraising dinner, although "access," is not corruption.

5. The Statute Is Not Narrowly Tailored To Address the Perceived Evil.

As shown in *Sun-Diamond Growers*, there are more narrowly tailored ways for the government to address corruption and the appearance of corruption. The "intricate web" of federal legislation and regulation, *id.* at 1408, demonstrates that government *need not* infringe First Amendment freedoms in order to address corruption or apparent corruption.

D. The Extra-Record Evidence Now Before the Court Fails To Justify the Missouri Contribution Limit.

Petitioners and *amici* supporting them have cited evidence outside the record in an attempt to show that contribution limits do not infringe speech, and that there was, in 1994, a public perception of corruption in Missouri. A remand would be required if it were necessary to weigh this evidence, but a close examination reveals that it fails to prove either proposition.

First, Petitioners argue that few people have the resources to make contributions in excess of the limit. Pet. Br. at 18-19; Public Citizen Br. at 9.³³ This, they assert, will lead people to suppose undue influence from such contributions. Apart from its lack of logic, this argument implies an effort, repudiated in *Buckley*, to equalize speech. 424 U.S. at 48-49. Moreover, the Princeton Survey found that contribution levels as high as \$50,000 do not create an appearance of impropriety. See p.24 above.

Petitioners and *amici* trivialize the importance to candidates, especially challengers, of these "few" large donations.

³³ Petitioners rely on data about pre-enactment contributions greater than \$2000. Because the law permits individuals to contribute \$1000 at the primary stage and again at the general election stage, the more pertinent inquiry concerns contributions in excess of \$1000.

Although a single large donation will not normally dominate a campaign's funding, in the aggregate larger donations can be critical to a candidate. The Lietzow Affidavit submitted by the State – and the public data from the Missouri Ethics Commission on which she relied – corroborates the point: Although only 2.38 percent of contributors to the 1994 State Auditor's race gave more than \$2000, they contributed a total of approximately \$347,598. Contributions over \$1000 in that race totaled approximately \$445,042 – over **25 percent** of the total amount raised.³⁴

Second, Petitioners and *amici* point out that in four of five statewide races in Missouri, average candidate expenditures increased between 1992 (before the limit was imposed) and 1996 (after the limit was imposed). Pet. Br. at 20-21. This, they suggest, proves candidates are not hampered by the 1994 law. Critically, these figures in no way support a claim of apparent corruption; a \$1000 contribution to the winning gubernatorial candidate was a mere .04 percent of his total funding; an amount 10 or even 50 times that high would not suggest corruption.

In addition, the amounts shown are “gross” amounts, before the costs of fundraising are deducted. The “net” amount available for speech in 1996 might have been lower than the amount available in 1992. For example, the NRSC's reports to the FEC for the 1997-98 election cycle show that its cost to raise money subject to the FECA was \$.63 per dollar raised.³⁵ In addition, contribution limits require candidates to devote more effort to fundraising, and thus have a “severe impact on political dialogue.” *Buckley*, 424 U.S. at 21. See pp. 6-10 above.

Third, Petitioners suggest that even if the contribution limit of \$1000 sustained in *Buckley* has eroded over time, lower

³⁴ Mo. Disclosure Reports filed by Candidates for State Auditor for 1994 Election Cycle, available from Mo. Ethics Comm'n.

³⁵ “Net” federal revenue can be calculated by adding the federal share of allocable fundraising expenses (from Schedule H4) to federal fundraising expenses (on line 21b) and refunds (line 28d), subtracting the fundraising portion of offsets (line 15), and then subtracting *this total* from contributions (line 11d).

contribution limits are acceptable at the state and local level. Pet. Br. at 42 n.30. Again, this undocumented assertion does not prove actual or apparent corruption justifying a lower limit. It also invites the Court to focus on how much campaigns *should* cost, not on whether contribution limits are necessary to deter actual or apparent corruption. Further, it may be more difficult for state candidates than for federal candidates to raise money; federal candidates often raise money from sources outside their districts and are often afforded broader news coverage.

Fourth, *amici* suggest that contribution limits can be justified by a need to address voter morale. Reed Br. at 21-22. Voter turnout in presidential elections has been declining steadily since 1960, however, and the decline has continued unabated since enactment of FECA in 1974.³⁶ Similarly, public confidence in government has “headed rather consistently downward since 1964 – with close to 80% of the public trusting the government then, compared with about 35% today.” Breyer, Address at the Tulsa County Bar Ass'n, at 3 (May 4, 1999). Federal contribution limits, enacted in 1974, have not addressed either concern.

Finally, *amici* supporting Petitioners point out that candidates now spend vast amounts of time raising money. Reed Br. at 14-16. As shown (p.8 above), the very commentator cited by *amici*, see *id.* at 15, acknowledges that the fundraising burden is a direct result of contribution limits. The solution to the “money chase” is elimination of oppressive contribution limits, not more regulation.

E. Alternatively, This Case Should Be Remanded for Development of a Complete Record.

The existing record in this case is adequate to show that the Missouri contribution limit imposes severe burdens on the First Amendment rights of candidates and contributors, and that Missouri has failed to prove a compelling interest to sustain the limit.

³⁶ Turnout in 1972 was 55.21%, and 1996 was 49.08%. See Sen. Hrg. 106-19, at 89 (Ex. 7 to Coats Stmt.)

If, however, the Court finds the record insufficient to so conclude, it should, we respectfully submit, remand the case for further fact-finding. The Court has recently done so in similar First Amendment cases. *See, e.g., Turner*, 512 U.S. at 668 (remanding for development of record on the extent to which local broadcast television was jeopardized by cable and the effects of must-carry on cable operators and programmers); *Colorado Republican*, 518 U.S. at 626 (remanding for compilation of a factual record to resolve a challenge to expenditure limits). Such a record would enable the lower courts, and if necessary this Court, to settle the question whether, today, a \$1075 contribution limit violates the First Amendment.

CONCLUSION

For the reasons set forth above, *amici* Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Republican Senatorial Committee urge the Court to affirm the decision of the Court of Appeals, or alternatively to remand for development of a complete factual record.

Respectfully submitted,

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Supreme Court, U. S.

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No. 98-963

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners,
v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN, and JOAN BRAY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

AMICUS CURIAE BRIEF OF GUN OWNERS OF AMERICA,
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NATIONAL CITIZENS LEGAL NETWORK,
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INTEREST OF THE AMICI CURIAE

Amici curiae Gun Owners of America, National Citizens Legal Network (a project of Citizens United Foundation), The Lincoln Institute for Research and Education, U.S. Border Control, and Policy Analysis Center are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.¹ Each of the *amici* was separately established in the State of California, the District of Columbia, or the Commonwealth of Virginia for purposes related to participation in the public policy process. For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, each of the *amici* has conducted research on other issues involving constitutional interpretation, and several have filed *amicus curiae* briefs in other federal litigation involving constitutional issues, including briefs before this Court.²

SUMMARY OF ARGUMENT

The court of appeals correctly applied the strict scrutiny standard to the Missouri law limiting campaign contributions.

¹ Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

² These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief. Such written consents, in the form of letters from counsel of record for the various parties, have been received and submitted to the Clerk of Court for filing. See Supreme Court Rule 37.3(a).

Petitioners' argument must be rejected as contrary to prior decisions and to the fundamental principle of popular sovereignty undergirding the First Amendment freedoms of speech, press, and assembly. As that fundamental principle prohibits the enactment of seditious libel laws because their purpose is to promote public confidence in the government, so also does it prohibit the enactment of laws regulating campaign finance which share the same unconstitutional purpose.

Because campaign finance laws rest upon an unconstitutional foundation, they spawn unconstitutional effects — discriminating in favor of incumbents over their challengers, the institutional press over their competitors, and major party candidates over independent and minor party candidates. Additionally, such laws violate the First Amendment guarantee of political speech recognized and enforced by this Court.

Although the Court could affirm the decision below solely on the strength of Buckley v. Valeo, 424 U.S. 1 (1976), and its progeny, nevertheless it should revisit Buckley and bring it into conformity with the fundamental principles of the First Amendment Speech, Press, and Assembly Clauses.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE STANDARD OF REVIEW TO MISSOURI'S LIMITS ON CONTRIBUTIONS TO POLITICAL CAMPAIGNS.

The question in this case is whether the court of appeals rightfully found that a 1994 Missouri law limiting political

campaign contributions violated respondents' First Amendment rights of speech and association. There is no doubt that it did.

First, the court of appeals applied the appropriate standard of review to the Missouri statute in question. Following the decision of this Court in Buckley, *supra*, and its own decisions in Carver v. Nixon, 72 F.3d 633, 638 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996), and in Russell v. Burris, 146 F.3d 563, 567 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 510 (1998), the court of appeals ruled that Missouri "must demonstrate...that it has a compelling interest and that the contribution limits at issue are narrowly drawn to serve that interest." Shrink Missouri Government PAC v. Adams (ShrinkPAC), 161 F.3d 519, 521 (8th Cir. 1998). This ruling is in keeping with this Court's decisions governing campaign reform laws that have been handed down since Buckley. See Colo. Rep. Fed. Camp. Comm. v. FEC, 518 U.S. 604 (1996).

Second, the court of appeals correctly applied the strict scrutiny standard to the facts of this case. In contrast with the findings of this Court in Buckley, 424 U.S. at 27, n.28, it found that Missouri provided no "demonstrable evidence that there were genuine problems [of corruption and the appearance of corruption] that resulted from contributions in amounts greater than the limits in place." Shrink PAC, *supra*, 161 F.3d at 521. Thus, it concluded that Missouri had not sustained its burden of proving a "compelling interest." Additionally, the court of appeals found no evidence that the particular contribution limits were "narrowly tailored to serve" any compelling state interest. To the contrary, the court found that "the limits set by SB650 ... can only be regarded as 'too low to allow meaningful participation in protected political speech....'" *Id.*, at 522-23. Such careful analysis of the

nature of the claimed interest, and the relation between means and ends, conforms with this Court's decisions in campaign regulation cases. See Colo. Rep. Fed. Camp. Comm. v. FEC, *supra*, 518 U.S. at 613-26.

Although petitioners claim that they did meet the strict scrutiny standard applied by the court of appeals (Pet. Br., pp. 26-36), the main thrust of their argument is that the court of appeals applied the wrong standard of review. Pet. Br., pp. 13-26, 36-43. Claiming that any limits on political campaign contributions "only marginally affect the First Amendment rights of contributors and candidates," such limits are said to be constitutional because they "clearly and appropriately serve the public's vital interest in preventing the reality and appearance of corruption and fostering confidence in Missouri's representative government and do not unduly burden First Amendment rights." Pet. Br., p. 10.

More fundamentally, petitioners claim that the decision of the court of appeals — if allowed to stand — "effectively overrules ... the foundation of campaign finance reform efforts for more than twenty years" because applying strict scrutiny would require "States somehow to prove that their citizens in fact perceive corruption in a system of unlimited campaign contributions; and ... to prove that contribution limits are set at the precise point beyond which that perception of corruption occurs." Pet. Br., pp. 2-3. Because this burden is, in petitioners' eyes, an impossible one, they propose that this Court lower the First Amendment standards and defer to "a reasonable legislative judgment about what constitutes a 'large' and potentially corrupting contribution and thus serves the State's compelling interest in preventing the appearance of such corruption." Pet. Br., p. 39.

To date, this Court has declined to take such a deferential approach to legislation impacting upon the First Amendment. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). Hence, this Court has refused earlier invitations in campaign finance litigation to "allow the Government's suggested labels to control our First Amendment analysis." Colo. Rep. Fed. Camp. Comm. v. FEC, *supra*, 518 U.S. at 627-28 (Kennedy, J., concurring in the judgment and dissenting in part, citing pp. 621-22). Petitioners have provided no good reason to depart from that practice here.

Nevertheless, petitioners have provided good reason for this Court to reexamine the distinction drawn in Buckley between the First Amendment protections as they apply to campaign contributions in contrast to those applied to campaign expenditures. Petitioners have argued here that Buckley established that legislative limits on "large" campaign contributions are *per se* constitutional because such contributions to political campaigns are "inherently" corrupting and such limits "clearly and appropriately serve the public's vital interest in preventing the reality and appearance of corruption and in fostering confidence in Missouri's representative government...." Pet. Br., pp. 10, 12. This argument is incompatible with the foundational purpose of the First Amendment and should be rejected by this Court. To that end, this Court should no longer follow Buckley's holding which permitted a government to regulate the conduct of election campaigns in pursuit of a policy of protecting public confidence in the American system of representative government.

II. CAMPAIGN FINANCE LIMITATIONS VIOLATE THE FIRST AMENDMENT'S GUARANTEES PRESERVING THE PEOPLE'S SOVEREIGNTY.

A. THE FIRST AMENDMENT'S SPEECH, PRESS AND ASSEMBLY CLAUSES PRESERVE THE FUNDAMENTAL PRINCIPLE OF POPULAR SOVEREIGNTY OVER GOVERNMENT.

Although not addressed by the courts below, nor in any of the briefs of the parties, the threshold issue in this case should be **why** the First Amendment's Speech, Press, and Assembly Clauses apply to State laws limiting money contributions to political campaigns engaged in by persons seeking election to State office. According to the express text of the First Amendment, only "Congress," not the legislatures of the several states, "shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." Yet, for nearly three-quarters of a century, this Court has applied these same protections against laws enacted by the legislatures of the several states and ordinances passed by their political subdivisions. *See, e.g., Fiske v. Kansas*, 274 U.S. 380 (1927); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Buckley v. American Constitutional Law Foundation, et al. ("ACLF")*, 525 U.S. ___, 119 S. Ct. 636 (1999). Thus, those Clauses have been applied to state and local laws regulating the finances of political campaigns, imposing the same First Amendment standards as imposed upon laws enacted by Congress. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

This was not the practice in our nation's early history. The First Amendment — indeed, the entire Bill of Rights — applied only to the national government, not to the States. *Barron v. Baltimore*, 32 U.S. 243 (1833). This view held even after the ratification of the Fourteenth Amendment, as this Court refused to apply specific provisions of the Bill of Rights to the States. *See, e.g., Slaughter-House Cases*, 83 U.S. 36 (1873); *United States v. Cruikshank*, 92 U.S. 542 (1876).

Just after the first quarter of the twentieth century, however, the picture began to change. This Court began to apply First Amendment guarantees of freedom of speech, press and assembly to the States because they were "of the very essence of a scheme of ordered liberty," and "so rooted in the tradition and conscience of our people as to be ranked as fundamental." *See Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937). While these *amici* concur with this Court's rulings that such First Amendment guarantees apply to the States, they do so **only** on the grounds that the Fourteenth Amendment applies those rights to State laws "which abridge the privileges and immunities of citizens of the United States."

For over a century, this Court has limited these privileges and immunities to those which "owe their existence to the Federal government [in] its National character...." *Slaughter-House Cases*, *supra*, 83 U.S. at 79.³ So the Court has applied

³ *See generally* Kimberly Shankman and Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, Cato Institute Policy Analysis No. 326 (Nov. 23, 1998); Clarence Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," *Harvard Journal of Law and Public Policy* 12 (1989).

the Privileges and Immunities Clause of the Fourteenth Amendment sparingly, only when "national issues" are being addressed. *See, e.g., Hague v. CIO*, 307 U.S. 496 (1939). Rightly understood, however, the "privileges and immunities of citizens of the United States" cannot be so compartmentalized. As Justice Kennedy recently observed, the United States Constitution created a national government for a "federal union" in which the citizenry which would have "two political capacities, one state and one federal...." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). With the ratification of the Fourteenth Amendment, the United States Constitution removed from each State the power to determine how a person becomes a citizen of that State, and conferred such citizenship upon all United States citizens according to the State of their residence. In this way, State citizenship, itself, became a privilege of United States citizenship.

One privilege of a United States citizen, as a citizen of a State, is to live under a State government that is "republican in form." Article IV, Section 4, U.S. Constitution. And at the heart of a "republican form of government" is the right of the people freely to elect their government officials. *Federalist No. 10*.

During its 1994 October Term, this Court welcomed the opportunity to reaffirm this republican principle, endorsing its earlier decision in Powell v. McCormack, 395 U.S. 486 (1969), that the "fundamental principle of our representative democracy," is that "sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives" U.S. Term Limits, supra, 514 U.S. at 794. This Court further explained that:

The true principle of a republic is, that the people should choose whom they please to govern them ... This great source, popular election, should be perfectly pure, and the most unbounded liberty allowed.' [and] that restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society.' [U.S. Term Limits, supra, 514 U.S. at 795.]

This principle of popular sovereignty undergirds the First Amendment guarantees of free speech, press and assembly. As James Madison said in his 1800 "Report on the Virginia Resolutions" in opposition to the Sedition Act of 1798:

In the United States ... [t]he people, not the government, possess the absolute sovereignty.... Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. [Thus] [t]hey are secured ... by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive ... but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.

Thus, this Court has acknowledged that campaign reform legislation must conform to the rights of the people to choose how they will participate in election campaigns.

In a republic where the people are sovereign, the ability of the citizenry to make informed choices

among candidates for office is essential, for the identities of those elected will inevitably shape the course that we follow as a nation. As this Court [previously] observed ... 'it can hardly be doubted that the constitutional guarantee [of freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.' [Buckley, *supra*, 424 U.S. at 14-15.]

This principle led the Buckley court to apply its highest standard — strict scrutiny — to the putative legislative purposes and the means employed by Congress in the Federal Election Campaign Act ("FECA") to regulate monetary contributions and expenditures in federal election campaigns. *Id.*, 424 U.S. at 29. Thus, it is this principle that implicitly underlies the ruling of the court of appeals in this case, applying "a strict standard of review." ShrinkPAC, *supra*, 161 F.3d at 522.

Petitioners argue to the contrary, seeking a lower standard of review because they believe that the only principle at stake is the people's faith in their government. Pet. Br., pp. 38-39. Not only have they forgotten that the primary purpose of the First Amendment is to preserve the "absolute sovereignty of the people" over their legislature, they also ignore the fact that the First Amendment was designed to preclude the enactment of legislation designed to preserve the people's confidence in their current government. As this Court quoted James Madison in New York Times v. Sullivan, 376 U.S. 254, 275 (1964):

If we advert to the nature of Republican Government, we shall find that the censorial power is

in the people over the Government, and not the Government over the people.

What is at stake in this case, then, is not just the appropriate constitutional test to be applied to the Missouri law in question, but the very First Amendment foundation upon which laws limiting campaign contributions supposedly rest. It is the position of these *amici* that there is no legitimate constitutional foundation for such laws, and that this Court should take this opportunity to revisit Buckley.

B. CAMPAIGN FINANCE LIMITS SERVE NO LEGITIMATE PURPOSE.

When the constitutionality of the FECA initially came to this Court, the United States Solicitor General contended that it served a broad range of goals. After Buckley, however, these goals have been essentially reduced to one: to maintain the people's confidence in America's system of representative government. Accordingly, petitioners claim that the Missouri law serves one purpose:

The fundamental realities that government officers who receive money or items of value appear to be in debt to the giver, and that this appearance erodes public confidence in government, are the basis of laws that limit campaign contributions and otherwise regulate campaign finance generally. [Pet. Br. p. 30.]

See also, Colo. Rep. Fed. Camp. Comm. v. FEC, *supra*, 518 U.S. at 609. According to the Missouri Attorney General, the goal of preserving "public confidence in our system of

representative government" is so substantial and compelling that no "proof that unregulated donations create the perception of corruption" is required. Rather, he insists that such "appearance of corruption" is "inherent" in any system that permits unlimited campaign contributions. According to this view, courts must defer, regardless of the absence of any concrete evidence, to the legislative determination that "unlimited direct contributions to candidates necessarily creates a public perception of corruption, and that limiting the size of contributions to candidates will ameliorate that ill." (Pet. Br., p. 34. Otherwise, these reformers maintain, "the very fabric of a democratic society [is endangered], for a democracy is effective only if the people have faith in those who govern." Pet. Br., p. 38 (citations omitted).

What is so striking about this apology for campaign finance regulation is that it almost exactly parallels the rationale given for the English common law crime of seditious libel. Under that law, the prohibition of statements impugning the reputation of the government or of its officials was justified as "very necessary for all governments" because "the people should have a good opinion of it." Furthermore, that law presumed that all such defamatory statements, even if true, damaged the government, because if the people possessed "an ill opinion of the government" for whatever reason, then "no government can subsist." Rex v. Tutchin, 14 Howell's State Trials 1095, 1128 (1704).

Twice, Congress attempted to impose upon the American people this English regime of seditious libel. First, a Federalist-led Congress passed the Sedition Act of 1798, punishing libels "against the government of the United States" in an effort to preserve the American form of government from

the perceived threat of the French Revolution. *See generally* J. Miller, Crisis in Freedom (1951). Second, in 1918 a Republican-led Congress passed the Sedition Act of 1918 prohibiting any act bringing "contempt or scorn for the form of government of the United States" in an effort to preserve America's government from the perceived threat of the Russian Revolution. *See generally* Lawrence, "Eclipse of Liberty: Civil Liberties in the United States during the First World War," 21 Wayne L. Rev. 33 (1974).

While neither law was struck down as unconstitutional, enforcement of the 1918 statute prompted Justice Oliver Wendell Holmes to write:

[T]he ultimate good ... is better reached by free trade of ideas — that the best test of truth is the power of the thought itself accepted in the competition of the market.... That at any rate is the theory of our Constitution [and] I think that we should be eternally vigilant against attempts to check the expressions of opinion that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. [Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).]

Fifty-five years later, Justice Holmes's view was vindicated by an unanimous Supreme Court when it struck down an Alabama libel statute in a suit brought by a government official. Writing for the majority, Justice William Brennan

observed that the First Amendment freedoms of speech, press and assembly together constituted "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, *supra*, 376 U.S. at 270. Drawing from "the lesson" learned "from the great controversy over the Sedition Act of 1798," Justice Brennan rejected the common law of seditious libel as undermining the original foundations of the First Amendment freedoms: the sovereignty of the people over their government. *Id.*, at 273-76.

At the heart of this Court's rejection of the common law of seditious libel, then, is the First Amendment principle that the government may not regulate speech in an effort to protect the government's reputation. Any such law reflects the constitutionally-rejected idea that sovereignty resides in the government, rather than in the people. As James Madison put it in the 1800 Virginia Resolutions in opposition to the Alien and Sedition Act of 1798:

In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the legislature are not only exempt themselves from distrust, but are considered sufficient guardians of the rights of their constituents....

In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power.

Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition....

Not surprisingly the legislative ambition about which James Madison warned is oftentimes packaged as reform. And nowhere is this more evident than in the efforts of Congress and many state legislatures, including Missouri, to enact campaign finance reform legislation.

C. LIMITATIONS ON CAMPAIGN FINANCE UNCONSTITUTIONALLY DISCRIMINATE IN FAVOR OF INCUMBENTS, THE INSTITUTIONAL PRESS AND MAJOR PARTY CANDIDATES.

In Buckley, Chief Justice Warren Burger predicted "that the Court's holding will invite avoidance, if not evasion, of the intent of the Act, with 'independent' committees undertaking 'unauthorized' activities in order to escape the limits on contributions." Buckley, *supra*, 424 U.S. at 253. In addition, the Chief Justice forecast "that the contribution limits of the Act create grave inequities that are aggravated by the Court's interpretation of the Act":

All candidates can now spend freely; affluent candidates ... can spend their own money without limit; yet contributions for the ordinary candidate are severely restricted in amount — and small contributors deterred. [*Id.*, 424 U.S. at 254.]

Both of the Chief Justice's observations have proven true. Not only has campaign reform legislation spawned innumerable "Political Action Committees," thereby blunting the impact of campaign contributions limits to particular candidates, but such laws have proved ineffectual in curbing contributions to political parties which, in turn, funnel the money into the parties' campaigns. FEC v. Colo. Rep. Fed. Camp. Comm., 1999 U.S. Dist. LEXIS 1822 (D.Colo., Feb. 18, 1999). Such developments have, in turn, aggravated the "significant inequities" about which he warned. Buckley, *supra*, 424 U.S. at 253-54. Not only has a candidate "with substantial personal resources [gained] a clear advantage over his less affluent opponents," but "[m]inority parties ... are prevented from accepting large single-donor contributions [relegating them to] compete for votes against two major parties whose expenditures [have become] vast" while "distinctions between contributions in money and contributions in services" have proved to "enhance the disproportional influence of groups who command large quantities of these volunteer services" while at the same time "not allowing for an inflation adjustment to the contribution limit." *Id.*, at 253-54.

Campaign reform legislation has not enhanced public confidence in government; rather, it has diminished it by favoring incumbent legislators over their challengers, the "institutional press" over competing interest groups, and major party candidates over minor party and independent candidates. Such favoritism is unconstitutional.

1. Limits on Campaign Finance Are Incumbent Protection Legislation.

As noted earlier, petitioners claim that limiting campaign finance purifies the political process from "private political influence," an "evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern." Pet. Br., p. 38. Stripped of its "high-sounding" language, what petitioners are really saying is that campaign contribution limits protect incumbents, for they are the natural beneficiaries of a system that cultivates in the people "faith in those who govern." After all, it is the incumbents, not their challengers, who have been governing.

As Justice Clarence Thomas has observed, "history demonstrates that the most significant effect of election reform has not been to purify public service, but to protect incumbents and increase the influence of special interest groups." Colo. Rep. Fed. Camp. Comm. v. FEC, *supra*, 518 U.S. at 644, n.9 (Thomas, J., concurring in the judgment and dissenting). The results of recent national elections and statewide elections in Missouri confirm that the true beneficiaries of so-called campaign reforms are incumbent office holders, who are able to use such "reform" to their advantage.

While challengers must create a campaign organization and donor base, incumbents already possess both. By virtue of their office, incumbents enjoy an array of advantages over their challengers that fall outside the scope of limitations on contributions. While some of these advantages flow naturally and properly from the office, others have been contrived so as to maximize the incumbents' edge over challengers. See

generally James C. Miller, III, Monopoly Politics, Hoover Institution Press (1999).

For example, members of Congress receive many taxpayer-funded benefits allowing each incumbent to enter an election hundreds of thousands of dollars ahead of his challenger. Such benefits include:

- Taxpayer-paid postage. Depending upon the number of addresses in their districts, incumbents can send nearly 1 million pieces of "franked" mail a year at taxpayers' expense.
- Taxpayer-paid personal staff. Incumbents are allowed to hire a staff at taxpayers' expense, many of whom in turn "volunteer" for their bosses' reelection campaigns.
- Taxpayer-paid constituent service. Incumbents are able to use the constituent services they provide as a means for more direct and frequent contact with voters.
- Taxpayer-paid travel. Incumbents are allowed to pay for travel expenses from taxpayer-funded "official expense accounts."
- Taxpayer-paid internet sites. Incumbents are allowed to develop and maintain internet web sites at taxpayers' expense.⁴

⁴ Revealingly, in 1996, when an internet provider sought to offer free internet sites to incumbents and challengers alike, the Federal Election Commission, in Advisory Opinion 1996-2, prevented it from doing so

- Taxpayer-paid recording studios. Incumbents have free access to facilities for the production of videotapes and audiotapes.

See O'Keefe and Steelman, *supra*; Miller, Monopoly Politics, *supra*, at 15.

Given these (and other) advantages, all of which are placed outside the reach of any purported campaign finance reform, it is no wonder that the reelection rate of incumbents has held at about 90 percent. Data compiled by the Federal Election Commission show that in the 1996 general house elections, every incumbent congressman in Missouri won reelection. See Federal Activity of House Campaigns 1997-98, Federal Election Commission.⁵

Moreover, contribution limitations imposed by the FECA ensure that incumbents enjoy a huge advantage over challengers in raising funds. In a recent report analyzing the 1998 congressional elections, the Federal Election Commission stated that "[as in past elections, incumbents received most of the [political action committee] PAC money, \$158.4 million, with challengers receiving \$21.5 million...." Federal Election

on the ground that it would purportedly constitute a prohibited in-kind contribution. See Eric O'Keefe and Aaron Steelman, The End of Representation: How Congress Stifles Electoral Competition, Cato Institute Policy Analysis No. 279 (Aug. 20, 1997).

⁵ This report is available on the Federal Election Commission's website, <http://www.fec.gov/1996/states/mohse97.htm> (visited June 3, 1999).

Commission News Release, FEC Reports On Congressional Fundraising For 1997-98 (April 28, 1999).

Data on Missouri state elections is equally remarkable. In the 1998 general elections, 93.3 percent of incumbent Missouri state senators and 95.8 percent of incumbent Missouri state house members won reelection. See Project Vote Smart, Missouri State Legislative Election 1998.⁶ By erecting new financial barriers in 1994, Missouri incumbents further increased their advantage over challengers. This is not reform; it is monopolization. Cf. John L. Kelley, Bringing The Market Back In: The Political Revitalization Of Market Liberalism, New York University Press (1997), at 128 ("If the logic of the antitrust movement had been applied to [FECA] it is difficult to see how it could have survived even cursory examination.")

Even those who support petitioners criticize the financial and other advantages incumbents enjoy over challengers. See, e.g., Common Cause, 87 Percent of House Incumbents In Financially Uncompetitive Races (November 2, 1998).⁷ Though they mourn the failure of the contribution limitations to promote competitive elections, these groups nonetheless support laws like Missouri's which perpetuate such advantages.

⁶ This report is available on Project Vote Smart's website, <http://www.vote-smart.org/elections/candidates.asp?eid=32> (visited June 4, 1999).

⁷ This article is available at Common Cause's website, <http://www.commoncause.org/publications/house.html> (visited June 3, 1999).

Petitioners ignore the First Amendment, yet attempt to seize the "moral high ground" with the argument that they are on the side of public righteousness. In fact, they are on the side of government self-interest, confirming Chief Justice Burger's eloquent observation that "[t]he re are many prices we pay for freedoms secured by the First Amendment; the risk of undue influence is one of them, confirming what we have long known: Freedom is hazardous, but some restraints are worse." Buckley, 424 U.S. at 256-257 (Burger, C.J., concurring in the judgment and dissenting).

2. Limits on Campaign Finance Benefit the Institutional Press.

The Missouri statute contains a press exception,⁸ similar to FECA's press exception.⁹ The reason is simple. Any effort to limit expenditures by or investments (*i.e.*, contributions) in the institutional press would be clearly unconstitutional. See Miami Herald v. Tornillo, 418 U.S. 241 (1974).

⁸ Mo. Rev. Stat. § 130.011(e). "Expenditure" does not include "Any news story, commentary or editorial which is broadcast or published by any broadcasting station, newspaper, magazine or other periodical without charge to the candidate or to any person supporting or opposing a candidate or ballot measure."

⁹ 2 U.S.C. section 431(9)(B). "The term "expenditure" does not include "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate...."

The Court in Buckley did not examine whether the "institutional press" had greater First Amendment speech and association rights vis-a-vis campaigns than ordinary citizens subject to the FECA. After Buckley, in 1978, Chief Justice Burger wrote "The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." First National Bank of Boston v. Bellotti, 435 U.S. 765, 798 (1978). It is now time for the Court to do just that — to determine if "significant inequities" discriminating in favor of the institutional press are a constitutionally permissible consequence of campaign reform legislation.

The press exception is profoundly important, as it applies to over 40,000 press outlets, which in the aggregate reach virtually every American on a regular basis. There are 4,747 AM radio stations (*The Wall Street Journal Almanac* 1999, 1998, p. 688); 7,566 FM radio stations (*id.*); 1,587 TV broadcast stations (as of April 1, 1999) (source: www.nab.org, web site of the National Association of Broadcasters); 10,845 basic and pay cable TV systems (1998) (*The New York Times* 1999 *Almanac*, p. 397); 1,509 daily newspapers (*id.*, p. 389); around 7,000 to 8,000 weekly newspapers (*id.*); about 5,000 consumer magazines (source: Washington office of the Magazine Publishers of America); and about 2,700 trade publications (source: *The New York Times* 1999 *Almanac*, p. 391.)¹⁰

Blatantly partisan editorials, commentaries and news coverage supporting a candidate for office can reach a high

¹⁰ Statistics are for 1997 unless otherwise stated.

percentage of all households in the electoral district, worth many thousands — if not millions — of dollars. With the press exception, a preferred class of corporations owning media outlets receives the exclusive right to unlimited corporate speech. This preference may be one reason why these media so insistently support campaign reform and are so laudatory of politicians who use their powers as incumbents to revise the "rules of the game" to promote their re-election. By doing so, they impair the ability of citizens to challenge their continued rule, in order to give themselves and the press greater power¹¹ in determining the outcome of future elections.

In sum, campaign contribution limitation legislation never addresses the appearance of corruption emanating from the institutional press, which alone remains free from any government-imposed limitation to influence the outcome of elections.

¹¹ See, e.g., "Campaign Finance Clock," *Washington Post*, May 24, 1999, p. A24, praising Washington, D.C. Metropolitan-area Republicans Constance Morella, Frank Wolf (who, in 1980 as a challenger to incumbent Congressman Joseph Fischer had complained that the incumbent has the advantages of "free mailing, free newsletters, a free mobile camper (to meet with constituents) and free staff allowances" and other benefits which Wolf estimated were worth \$1.2 million (*Fairfax Journal*, June 13, 1980, p. 1) and Tom Davis for their willingness to sign a discharge petition in 1998 to force a House vote on campaign reform legislation. See also "Editorials Release Campaign Finance Reform," *The Atlanta Constitution*, May 21, 1999, p. A18.

3. Limits on Campaign Finance Benefit the Two Major Parties.

The Buckley Court acknowledged that the contribution limits, including their disclosure requirements, contained in the Federal Election Campaign Act posed a potentially discriminatory impact upon minor parties. But the court deferred ruling on such claims to future litigation. Buckley, *supra*, 424 U.S. at 68-74. This Court need defer no longer.

Since Buckley, this Court has ruled that "independent expenditures" on behalf of a candidate made by a political party committee could not be limited as "contributions" to that candidate. Colo. Rep. Fed. Camp. Comm. v. FEC, 518 U.S. 604 (1996). And on February 18, 1999, the United States District Court for the District of Colorado ruled that "coordinated expenditures" on behalf of a candidate made by a political party committee could likewise not be limited as "contributions" to that candidate. FEC v. Colo. Rep. Fed. Camp. Comm., 1999 U.S. Dist. LEXIS 1822 (D.Colo., Feb. 18, 1999). Taken together, these rulings mean that political parties may expend unlimited amounts of money in support of their party candidates for office.

These two rulings confer an enormous advantage on candidates affiliated with major parties, further increasing their advantage over independent candidates and those associated with minor parties. In the 1999 Colorado Republican decision, the district court acknowledged that candidates routinely participate in the fund-raising efforts of their parties, that the "government" parties track which incumbents helped raise contributions to the party committees and use this information to determine allocations of party campaign funds, and that

contributors who have already made their maximum contribution to the candidate's committee are encouraged to give to the party committee so that the contribution can indirectly assist the candidate by party spending. *Id.*, 1999 U.S. Dist. LEXIS 1822 at **17-18. Quoting from Justice Kennedy's opinion in the 1996 Colorado Republican decision, the court explained that

Party spending 'in cooperation, consultation or concert with' a candidate therefore is indistinguishable in substance from expenditures by the candidate or his campaign committee. We held in Buckley that the First Amendment does not permit regulation of the latter, see 424 U.S. at 54-59 ... and it should not permit this regulation of the former.... [*Id.*, at **53-54.]

It is urged by these *amici* that, because coordinated party expenditures (like independent expenditures) cannot be limited, this Court should avoid an even more profound imbalance in favor of the two "government parties" by removing limitations on contributions to all third-party candidates.

D. LIMITATIONS ON CAMPAIGN FINANCE REQUIRE AN ENFORCEMENT SYSTEM INCOMPATIBLE WITH THE FIRST AMENDMENT PROTECTION OF ANONYMOUS POLITICAL SPEECH.

In order to enforce the limits on campaign finance, and their underlying policy of eliminating even the appearance of corruption, the Missouri law, like the FECA, compels the

disclosure of the names of contributors of amounts that exceed a statutory maximum. In Buckley, this Court struggled to find a constitutional justification for such "compelled disclosure" in light of a long line of cases striking down similar laws. It did so on three grounds: (1) "[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office.'"; (2) "[Disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity"; and (3) "[Disclosure requirements are an essential means of gathering data necessary to detect violations of the contribution limitations...." Buckley, *supra*, 424 U.S., at 67-68.

Prior to this ruling, this Court had never upheld a law compelling disclosure of the names of people in an associative relationship **fully** protected by the First Amendment.¹² See NAACP v. Alabama, 357 U.S. 449 (1958); Bates v. Little Rock, 361 U.S. 516 (1960); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961); Gibson v. Florida Legislative Comm., 372 U.S. 539, 546 (1963); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982). Moreover, prior to Buckley this Court found that:

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the

¹² This rule was not followed where the disclosure related to a Congressional investigation into a foreign-controlled organization dedicated to the violent overthrow of the American government. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.... Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes. [Talley v. California, 362 U.S. 60, 64-65 (1960).]

Subsequent to Buckley, this Court has twice revisited the subject of "anonymous" political speech. Both times it has struck down laws compelling disclosure. In McIntyre v. Ohio Elections Comm'n, this Court wrote:

Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. [514 U.S. 334, 357 (1995), citation omitted.]

In Buckley v. ACLF, *supra*, this Court upheld a lower court ruling striking down a Colorado statutory requirement that initiative-petition circulators wear identification badges. Observing that "[p]etition circulation... 'of necessity involves both the expression of a desire for political change and a

discussion of the merits of the proposed change," the Court found that the statute caused a heightened injury to speech "because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." 119 S. Ct. at 646.

This Court also upheld the lower court's decision to strike down the requirement that ballot-initiative proponents file "detailed monthly disclosures" of the name and addresses of each paid circulator, and the amount of money paid and owed to each circulator. *Id.*, at 647.

Only in Buckley has this Court examined and upheld government regulation preventing individuals from retaining anonymity when engaged in political speech. While the Court has valiantly attempted to distinguish the McIntyre and ACLF rulings from Buckley, the effort has failed. As Justice Scalia observed in dissent in McIntyre:

We have approved much more onerous disclosure requirements in the name of fair elections.... The Court's attempt to distinguish Buckley ... would be unconvincing, even if it were accurate in its statement that the disclosure requirement there at issue 'reveals far less information' than requiring disclosure of the identity of the author of a specific campaign statement. That happens not to be accurate.... Besides which the burden of complying with this provision [in Buckley], which includes the filing of quarterly reports, is infinitely more onerous than Ohio's simple requirement for signature of campaign literature. If Buckley remains the law, this is an easy case. [514 U.S., at 383-84.]

Buckley is not out of line just because of the onerous burdens imposed by FECA's disclosure provisions. Rather, its disclosure requirements serve no purposes legitimate under the First Amendment. As Chief Justice Burger observed in Buckley, the enforcement of campaign contribution limitations would inevitably benefit the political status quo.

Rank-and-file union members or rising junior executives may now think twice before making even modest contributions to a candidate who is disfavored by the union or management hierarchy. Similarly, potential contributors may well decline to take the obvious risks entailed in making a reportable contribution to the opponent of a well-entrenched incumbent. This fact of political life did not go unnoticed by the Congress:

"The disclosure provisions really have in fact made it difficult for challengers to challenge incumbents." 120 Cong. Rec. 34392 (1974) (remarks of Sen. Long). [424 U.S. at 237.]

No wonder the Chief Justice observed that the FECA's "contribution limits are a far more severe restriction on First Amendment activity than the sort of 'chilling' legislation for which the Court has shown such extraordinary concern in the past." 424 U.S. at 245. Clearly, Buckley now lies as "a derelict on the waters of the law." See Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). It is time for this Court to remove Buckley from the otherwise legitimate family of cases protecting anonymous political speech and association under the First Amendment.

CONCLUSION

For the foregoing reasons, *amici curiae* Gun Owners of America, Lincoln Institute for Research and Education, National Citizens Legal Network, U.S. Border Control, and Policy Analysis Center respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,

Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN, and JOAN BRAY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing AMICUS CURIAE BRIEF OF GUN OWNERS OF AMERICA, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, NATIONAL CITIZENS LEGAL NETWORK (A PROJECT OF CITIZENS UNITED FOUNDATION), U.S. BORDER CONTROL, AND POLICY ANALYSIS CENTER IN SUPPORT OF RESPONDENTS has been made, this 7th day of June, 1999, by depositing copies thereof in the United States mail, First-Class, postage prepaid, addressed respectively to counsel of record for the parties, and to other counsel for the parties and *amici curiae*, as follows:

Jeremiah W. Nixon, Esquire
Attorney General
James R. Layton, Esquire
State Solicitor
Paul R. Maguffee, Esquire
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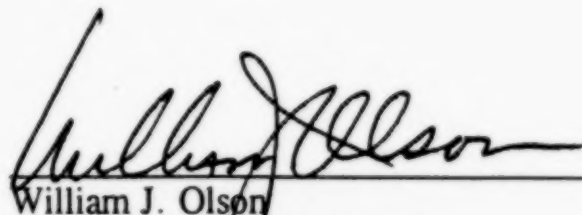
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22

Supreme Court, U. S.
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**In the
Supreme Court of the United States
October Term, 1998**

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, et al.,
Petitioners,

v.

**SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN, and JOAN BRAY,**
Respondents.

**On Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit**

**BRIEF OF AMICI CURIAE PACIFIC LEGAL
FOUNDATION AND LINCOLN CLUB OF ORANGE
COUNTY IN SUPPORT OF RESPONDENTS**

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EDITOR'S NOTE

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QUESTION PRESENTED

Whether the court of appeals erred in declaring that Missouri's campaign contribution limits for statewide office, which exceed the limits expressly approved by this Court for national elections in *Buckley v. Valeo*, 424 U.S. 1 (1976), violate the First Amendment?

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INTEREST OF AMICI¹

For 25 years Pacific Legal Foundation attorneys have been litigating in support of individual rights. To this end, Pacific Legal Foundation attorneys have been before this Court for the purpose of representing individuals whose First Amendment rights had been violated. *See Keller v. State Bar*, 496 U.S. 1 (1990). Pacific Legal Foundation has also participated as a friend of the court in many other First Amendment cases this Court has heard in the past decade. *See Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998); *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1996); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); and *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

The Lincoln Club of Orange County is a community-based membership organization with a political action committee (Club), formed for the purpose of making contributions to California state and local candidates. Currently, the Club has over 300 individual members. Because many California municipalities and, at various times, California law, have imposed contribution limits which thereby infringe upon the associational rights of the Club and its members, the Club has a direct interest in the law governing contribution limits.

Pursuant to Supreme Court Rule 37, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

¹ Pursuant to Supreme Court Rule 37.6, amici curiae Pacific Legal Foundation and the Lincoln Club of Orange County affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

Zev David Fredman was a candidate for the office of Missouri state auditor in the 1998 Republican primary. To this end, he formed a candidate committee ("Fredman for Auditor"), filed the requisite candidate papers, and paid a filing fee.

As part of his initial campaign strategy, Fredman desired to raise large sums of funds from various donors and possibly from Republican Party leaders. The purpose of Fredman's strategy was to obtain seed money in order to allow him to compete effectively in the Republican primary. His ability to attract other contributions--and thereby become a competitive candidate--was a function of his ability to raise early seed money. This was particularly important for Fredman because he was not a professional politician. As a first-time candidate for statewide political office, he did not have either a vast network of political contacts or a well-established base of contributors. As a private businessman who had to continue to manage his business while mounting a statewide campaign, Fredman did not have the time or resources to raise the seed money necessary for his campaign by asking a large number of contributors for small contributions. Instead, Fredman needed to depend on a small number of large contributions.

Missouri law prohibited Fredman from raising more than \$1,075 per donor for the primary election. Mo. Ann. Stat. section 130.032(1)(6). Missouri law further provided that contributors and candidates who violated Missouri's contribution limits would be subject to criminal sanctions. Mo. Ann. Stat. section 130.081.

Shrink Missouri Government (SMG) PAC is a political action committee, duly organized under the laws of Missouri. During the 1994, 1996, and 1998 election cycles, it made contributions to candidates for Missouri elective office, and

continues in operation for the purpose of making similar contributions in the future. Because SMG believed that Fredman's candidacy for state auditor promoted the political viewpoints and goals of the PAC and its contributors, SMG contributed \$1,025 to the "Fredman for Auditor" committee on June 23, 1997, and an additional \$50 on February 25, 1998. By this latter date, SMG had therefore provided the maximum contribution to the "Fredman for Auditor" campaign for the primary election. SMG would have contributed more than \$1,075 to the "Fredman for Auditor" committee for the primary election, but was prohibited from doing so by Missouri law.

Because Missouri's contribution limits severely burdened SMG's ability to promote its political viewpoints and to express support for candidates through campaign contributions, and because Missouri's contribution limits precluded the ability of Fredman to raise early seed money and thereby prevented him from mounting a competitive campaign, SMG and Fredman filed an action under 42 U.S.C. section 1983 in the United States District Court for the Eastern District of Missouri. SMG and Fredman sought declaratory and injunctive relief against the provisions of Missouri's campaign laws that limited contributions to candidates for office. On May 12, 1998, the Honorable Catherine D. Perry, United States District Judge, entered a final judgment holding that the contribution limits did not violate the First Amendment. SMG and Fredman appealed this judgment to the Eighth Circuit Court of Appeals. On November 30, 1998, the United States Court of Appeals for the Eighth Circuit found that Missouri's contribution limits violated the First Amendment of the United States Constitution. *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998).

SUMMARY OF ARGUMENT

In the seminal case of *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court explained that "contribution and expenditure limitations operate in an area of the *most fundamental* First Amendment activities." *Id.* at 14 (emphasis added). Stating that

both expenditure and contribution restrictions implicate political speech and association, this Court in *Buckley* further noted that "contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties." *Id.* at 18.

This Court's established First Amendment jurisprudence makes clear that state election laws which "directly regulate[] core political speech" or which "impose[] 'severe burdens'" on speech or association are always subject to strict scrutiny. *Buckley v. American Constitutional Law Foundation*, 119 S. Ct. 636, 642 n.12, 648 (1999) (Thomas, J., concurring in the judgment). As this Court has held that contribution limits restrict "fundamental" First Amendment activities (*Buckley*, 424 U.S. at 14), the court below properly applied strict scrutiny with respect to Missouri's campaign contribution limits.

The state's contention that substantial "deference" should be given to legislatively imposed contribution limits is, in reality, a *subterfuge* utilized to mask the flawed premise underlying campaign contribution limits. The flawed premise is that rather than serving as *limitation* on legislative power, the First Amendment--according to campaign contribution limit proponents--embodies a *normative policy end* towards which society should strive. This normative policy end is a "level playing field" where all citizens have a *government compelled* "equal opportunity" for self-expression.

Not only has this Court *categorically rejected* the notion that the exercise of free speech by some may be limited for the purpose of amplifying the speech of others, but also, the state's argument fails to recognize the potential--in the context of campaign finance reform--for "legislators to set the rules of the electoral game so as to keep themselves in power and keep potential challengers out of it." *Colorado Republican Federal*

Campaign Committee v. Federal Election Commission, 116 S. Ct. 2309, 2329 n.9 (1996) (Thomas, J., concurring in part and dissenting in part).

Moreover, in order to survive strict scrutiny, a statute regulating fundamental rights must be narrowly tailored to serve a compelling governmental interest. In the context of campaign finance, the only governmental interest that this Court has accepted as "compelling" is the prevention of actual and apparent corruption. *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985). This Court has defined corruption narrowly, to include *only a financial quid pro quo*. *Id.* at 497.

To this end, nearly a quarter century has passed since this Court decided *Buckley* and much has changed since that time with respect to the regulation of election-related activities. More specifically, the rigorous enforcement of bribery statutes and the adoption and enforcement of comprehensive disclosure schemes by all 50 states--coupled with the intense scrutiny by the press with respect to the financing of elections--illustrates that the "blunderbuss approach" of contribution limits "cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent." *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in part and dissenting in part). Experiences from Missouri, California, and other jurisdictions indicate that less restrictive means are available to prevent actual and apparent corruption.

ARGUMENT

I

THE COURT BELOW APPLIED THE PROPER STANDARD OF REVIEW

A. This Court Has Made Clear That the “Now- Settled Approach” with Respect to State Regulations Imposing Severe Burdens on Speech Is That Such Regulations Must Be Narrowly Tailored to Serve a Compelling State Interest

In the seminal case of *Buckley v. Valeo*, 424 U.S. 1, this Court explained:

Contribution and expenditure limitations operate in an area of the *most fundamental First Amendment activities*. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. *The First Amendment affords the broadest protection to such political expression* in order “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

Id. at 14 (citation omitted, emphasis added). The *Buckley* Court made clear that both expenditure *and contribution restrictions* implicate political speech and association, stating that

contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties.

Id. at 18.

Notwithstanding this Court’s recognition that *both expenditure and contribution limits* implicate “fundamental First Amendment activities” (*id.* at 14), it has not gone “unnoticed”

that this Court has seemed more “forgiving” in the level of scrutiny applied in its review of contribution limits. *Colorado Republican*, 116 S. Ct. at 2329 n.7; *See also California Medical Association v. Federal Election Commission*, 453 U.S. 182, 196 (1981) (contributions are “not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection”); *National Conservative Political Action Committee*, 470 U.S. at 501; *Vannatta v. Keisling*, 151 F.3d 1215, 1221 (9th Cir. 1998) (applying a “rigorous” level of scrutiny with respect to contribution limitations).

In contrast, this Court has clearly and unequivocally applied strict scrutiny to expenditure limits, finding that such limits are subject to nearly a *per se* rule of unconstitutionality as there exists no compelling governmental reason to impose direct limitations on such political speech. *See Buckley*, 424 U.S. at 44-59; *Colorado Republican*, 116 S. Ct. at 2312 (opinion of Breyer, J.); *National Conservative Political Action Committee*, 470 U.S. at 496-97; *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 297-98 (1981).

This perceived distinction between the level of deference provided to campaign contributions as opposed to campaign expenditures has its roots in this Court’s statement in *Buckley* that contribution limits “entail[] only a marginal restriction upon the contributor’s ability to engage in free communication” because “the transformation of contributions into political debate involves speech by someone other than the contributor.” *Buckley*, 424 U.S. at 20-21. In contrast, expenditure limits, the *Buckley* Court stated, “represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.” *Id.* at 19.

It was this distinction this Court utilized in *California Medical Association* to uphold the Federal Election Campaign Act (FECA) contribution limits on the amount a trade association was permitted to give to a multicandidate political action committee. In so holding, the *California Medical Asso-*

ciation Court noted that contributions to a political committee constituted "speech by proxy" and therefore limits on such activity were subject to less intense judicial scrutiny. *California Medical Association*, 453 U.S. at 196.

Although Amici do not intend to simply dismiss this apparent distinction as set forth above, Amici respectfully submit that subjecting campaign contribution limits to anything other than "strict scrutiny" defies logic and directly contravenes this Court's First Amendment jurisprudence.

1. Political Contributions and Expenditures Are Indistinguishable

The distinction between expenditure and contribution limits has "no constitutional significance." *National Conservative Political Action Committee*, 470 U.S. at 518 (Marshall, J., dissenting). "[P]eople--candidates and contributors--spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utter the words." *Buckley*, 424 U.S. at 244 (Burger, C.J., concurring in part and dissenting in part). Moreover, contributions to a political campaign is exactly the type of "group association" this Court has long-recognized as being accorded the most "exacting" protection by the First Amendment. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Citizens Against Rent Control*, 454 U.S. at 294. The ability to freely communicate ideas and participate in group association by making campaign contributions is central to our form of representative democracy. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). The exercise of such free speech rights allows citizens to communicate a message of support directly to their candidate and at the same time allows the candidate and his or her backers

to further garnish electoral support. See Lillian BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045, 1054 (1985). Indeed, as this Court has noted:

[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

Citizens Against Rent Control, 454 U.S. at 294 (emphasis added); see also *United States Jaycees*, 468 U.S. at 622 ("An individual's freedom to . . . petition the government for the redress of grievances could not be vigorously protected from interference from the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

It is perhaps with these thoughts in mind that three members of the *Buckley* Court found the distinction between contributions and expenditures untenable at the time (see *Buckley*, 424 U.S. at 241, 244 (Burger, C.J., concurring in part and dissenting in part) ("The Court's attempt to distinguish the communication inherent in political contributions from the speech aspects of political expenditures simply 'will not wash.'"); *id.* at 261 (White, J., concurring in part and dissenting in part) ("[I]t is difficult to see the difference between the two situations."); *id.* at 290 (Blackmun, J., concurring in part and dissenting in part) ("I am not persuaded that the Court makes . . . a principled

distinction between contribution limitations, on the one hand, and the expenditure limitations on the other”), and two other members have subsequently disavowed it. See *National Conservative Political Action Committee*, 470 U.S. at 518-19 (Marshall, J., dissenting) (“I now believe the distinction has no constitutional significance.”); *Colorado Republican*, 116 S. Ct. at 2325 and n.4 (Thomas, J., concurring in part and dissenting in part) (“In my view, the distinction [between contributions and expenditures] lacks constitutional significance, and I would not adhere to it.”).

Amici therefore find it compelling that in the course of the 23 years since this Court decided *Buckley* substantial precedent has evolved supporting the conclusion that “contributions and expenditures are two sides of the same First Amendment coin.” 424 U.S. at 241 (Burger, C.J., concurring in part and dissenting in part)². Amici therefore submit that contribution limits of the

² As a practical matter, the reason contribution and expenditure limits involve “two sides of the same First Amendment coin” (*id.*) is because both campaign contributions and expenditures are utilized for the *exact same purpose*; namely, conveying a political message in the “marketplace” of “ideas.” *Citizens Against Rent Control*, 454 U.S. at 295. This is illustrated by reference to a recent example from a statewide campaign in California—which currently does *not* impose contribution limits on state candidates. The 1998 Democratic gubernatorial primary pitted Al Checchi, a multimillionaire businessman whose personal campaign expenditures could not have been constitutionally limited, against Gray Davis, a candidate without such resources. See *Justices May Revive Cap on Contributions*, L.A. Times, Dec. 9, 1998. As the attached California campaign disclosure forms illustrate (see Appendix B), funds raised by both the Checchi and Davis committees (whether in the form of personal expenditures by Checchi or contributions from supporters received by Davis) are used for the *exact same purpose*; paying political professionals and other vendors to disseminate the political committees’ message. Moreover, had California law imposed campaign contribution limits on statewide candidates such as Davis at that time, that would have (continued...)

type at issue in this case should undoubtedly be subject to strict scrutiny.

2. Subjecting Contribution Limits to Anything Other Than Strict Scrutiny Would Directly Contravene This Court’s Established First Amendment Jurisprudence

This Court has long recognized that state election laws “directly regulat[ing] core political speech” or which “impose ‘severe burdens’” on speech or association are always subject to strict scrutiny. *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S. Ct. at 649 (Thomas, J., concurring in judgment).

For example, just recently in *American Constitutional Law Foundation* this Court applied strict scrutiny in reviewing certain Colorado statutes regulating the initiative and referendum process. *American Constitutional Law Foundation*, 119 S. Ct. at 642 n.12. Other precedents from this Court where strict scrutiny has been applied with respect to state laws which regulate core political speech or impose severe burdens on such speech are abundant. See *Burson v. Freeman*, 504 U.S. 191,

²(...continued)

undoubtedly vitiated the associational rights of Davis backers. Their collective voice would have been subject to a limit (as Davis could have only raised funds in small incremental amounts), whereas the collective voice of Checchi’s supporters would have been comparatively amplified as he could spend *unlimited amounts of his own money in furtherance of his candidacy*. See *Citizens Against Rent Control*, 454 U.S. at 296 (“To place a . . . limit . . . on individuals wishing to band together to advance their views . . . is clearly a restraint on the right of association.”); See also *National Conservative Political Action Committee*, 470 U.S. at 495 (“To say that [collective action by] pooling . . . resources . . . is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.”).

198 (1992) (applying strict scrutiny in determining whether to uphold a state law prohibiting the solicitation of voters and the distribution of campaign literature within 100 feet of the entrance of a polling place); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982) (strict scrutiny applied to state regulations of candidate promises); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (strict scrutiny applied to a state law prohibiting corporate contributions to ballot measures); *Citizens Against Rent Control*, 454 U.S. at 294 (applying strict scrutiny to a municipal ordinance limiting contributions to ballot measure committees); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995) (applying strict scrutiny to a state statute preventing anonymous campaign literature). Indeed, even where a state law does not directly regulate core political speech, this Court has applied strict scrutiny. See *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (applying strict scrutiny to a state statute making it a felony to pay initiative petition circulators).

As this Court has previously noted, campaign contribution limits operate in "an area of the most fundamental First Amendment activities" (*Buckley*, 424 U.S. at 14) as they "impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties." *Id.* at 18. Consequently, regulations imposing expenditure or contribution limits have *always been subject to strict scrutiny*--notwithstanding the wordsmithing and machinations present in certain passages in *California Medical Association*. Indeed, as this Court recently noted:

In these cases [citing *Buckley*, *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), *National Conservative Political Action Committee*, and *California Medical Association*], the Court essentially weighed the First Amendment interest in permitting candidates (*and their supporters*) to spend money to advance their political views, against a "*compelling*" governmental interest in assuring the

electoral system's legitimacy, protecting it from the appearance and reality of corruption.

Colorado Republican, 116 S. Ct. at 2313 (emphasis added). Thus, since *Buckley*, this Court has always required that contribution limits be subject to "exacting judicial review" (*Citizens Against Rent Control*, 454 U.S. at 294) and such "exacting" review has always been *equated with strict scrutiny*. *McIntyre*, 514 U.S. at 346 n.10. It therefore appears clear that the "now-settled approach" with respect to "state regulations 'imposing "severe burdens" on speech'" is that such regulations must "be narrowly tailored to serve a compelling state interest." *American Constitutional Law Foundation*, 119 S. Ct. at 642 n.12; see also *id.* at 649 (Thomas, J., concurring in the judgment) ("When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review . . .").

Therefore, as this Court has previously held that contribution limits restrict "fundamental" First Amendment activities (*Buckley*, 424 U.S. at 14), and that state regulations imposing such contribution limits are subject to "exacting judicial review" (*Citizens Against Rent Control*, 454 U.S. at 294), the court below properly applied strict scrutiny with respect to Missouri's campaign contribution limits.

**B. The Purpose of Applying Strict Scrutiny Is
Not to Truncate Legislative Prerogatives but
Rather to "Jealously Guard" Against
Usurpations of Fundamental Rights**

Contrary to the assertions of the state and its amici, the opinion of the court below does not abrogate the ability of state legislatures to regulate state electoral activity. To the contrary, the purpose of applying strict scrutiny is not to truncate legislative prerogatives, but, rather, to jealously guard against

usurpations of fundamental rights. Indeed, as this Court well knows:

In the usual case . . . [t]o survive judicial scrutiny a statutory enactment need only have a reasonable relationship to the promotion of an objective which the Constitution does not independently forbid, *unless the legislation trenches on fundamental constitutional rights*.

But where the challenged legislation implicates fundamental constitutional guarantees, a far more demanding scrutiny is required. For example . . . the presumption of constitutionality is lessened when the Court reviews legislation endangering fundamental constitutional rights, *such as freedom of speech* Legislation touching substantially on these areas comes [before a court] bearing a heavy burden which its proponents must carry.

Nixon v. Administrator of General Services, 433 U.S. 425, 506 (1977) (Burger, C.J., dissenting) (emphasis added). Accordingly, "because of the significant impact on First Amendment rights" (*id.* at 532) and perhaps with the above thoughts in mind, this Court has always required state election laws regulating political speech to undergo "exacting" or "strict scrutiny." *Id.*; see also *Citizens Against Rent Control*, 454 U.S. at 294.

Petitioners' contention--that substantial "deference" should be given to legislatively imposed contribution limits--is, in reality, a *subterfuge* utilized to mask the flawed premise underlying campaign contribution limits such as those at issue here. The flawed premise is that rather than serving as a *limitation* on legislative power, the First Amendment--according to campaign contribution limit proponents--embodies a *normative policy end* towards which society should strive. This normative policy end is a "level playing field" where all citizens have a

government compelled "equal" opportunity for self-expression. This normative policy end underlying contribution limits of the type at issue here is fatally flawed for two reasons.

First, this Court has *categorically rejected* the notion that the exercise of free speech by some may be limited for the purpose of amplifying the speech of others:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is *wholly foreign to the First Amendment*, which was designed "to secure the 'widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion*.

Citizens Against Rent Control, 454 U.S. at 295-96 (citations omitted; emphasis added).

Second, and perhaps more fundamental, the normative policy end that underlies contribution limits such as those at issue here is, in reality, a repackaged version of an argument this Court has rebuked in the past. More specifically, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court declared unconstitutional a Florida statute that provided a "right of reply" for political candidates with respect to newspapers which had attacked or otherwise editorialized in opposition to them. Defending the statute with an argument remarkably similar to the one advanced by the government and its amici in this case--that political campaign giving and by extension the election of representatives "is dominated and controlled by well-endowed "special interests"--the state of Florida argued that the reply statute was necessary as "[t]he First

Amendment interest of the public being informed [was] in peril because the 'marketplace of ideas' [was] a monopoly controlled by the owners of the market." *Id.* at 251. According to the State of Florida, the First Amendment imposed a "fiduciary obligation" on the government "to ensure that a wide variety of views reach the public." *Id.* at 251, 248.

Rejecting this contention, this Court stated:

[T]here is practically universal agreement that a major purpose of [the First Amendment] [is] to protect the free discussion of governmental affairs.

....

... [S]ociety must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed.

Id. at 259-60 (White, J., concurring in judgment).

Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973), offers further support to reject the "level playing field argument" advanced by the government and its amici. In that case, this Court held that there was no First Amendment requirement for broadcasters to sell time for editorial announcements. *Id.* at 130-32. Thus, this Court rejected attempts by the plaintiffs in that case to turn the First Amendment into a "sword" rather than a shield against government overreaching. See also *Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998) (rejecting third-party candidate's argument that the First Amendment gave him a right of access to participate in a candidate debate hosted by a state-owned public television broadcaster).

Far from imposing a duty on government to "level the playing field," the First Amendment serves as a *limitation* on legislative power. Standing alone, the First Amendment provides:

Congress shall make *no law* . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. 1 (emphasis added). This limitation on legislative power is, of course, made applicable to the states through the Fourteenth Amendment. See, e.g., *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); see also *McIntyre*, 514 U.S. at 336 n.1.

But even assuming arguendo, that, as the government and its amici contend, the First Amendment can be used to "level the playing field" (see, e.g., *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 375 (1969) (upholding the then-existing Federal Communication Commission's "fairness doctrine" on the ground the policy "enhanced" rather than abridged First Amendment principles),³ this argument "fails to acknowledge . . . the potential for legislators to set the rules of the electoral game so as to keep

³ It is to be noted, however, that *Red Lion* relied, in part, on the finding that the ability of citizens to broadcast viewpoints was curtailed to the extent that effectively doing so relied on their obtaining access to scarce broadcast mediums such as television and radio frequencies. Amici respectfully submit that the rationale of *Red Lion* may no longer be viable to the extent that broadcast mediums are no longer scarce in this "internet" or "world wide web" age. More specifically, the development of the internet and the world wide web provide most citizens with virtually unfettered low-cost access to a means of broadcasting viewpoints. See *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2335 and n.9 (1997) ("Any person or organization with a computer connected to the Internet can 'publish' information. Publishers include . . . advocacy groups and individuals. . . . 'Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about the person or organization, which are available to everyone on the Web.'").

themselves in power and keep potential challengers out of it." *Colorado Republican*, 116 S. Ct. at 239 and n.9 (Thomas, J., concurring in part and dissenting in part). "Indeed, history demonstrates that the most significant effect of election reform has been not to purify public service, but to protect incumbents and increase the influence of special interest groups." *Id.* Therefore, when state legislatures--such as the Missouri Legislature--seek to "ration political expression in the electoral process, [courts] ought not simply acquiesce in [legislatures'] judgment." *Id.* (emphasis added).

As Professor BeVier points out:

Courts must police inhibitions on political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out

....

Indeed, there are reasons to believe that legislators, given free rein to inhibit political activity, might attempt to restructure the political balance of power so as principally to benefit themselves and their political allies. In fact, many political process "reforms" seem to promise tempting short-run political advantages to incumbents and their allies.

BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, *supra*, at 1075-76.

Moreover, evidence bears this point out as the advantages of holding office (such as franking privileges, media attention, etc.) certainly provide incumbent candidates with a multitude of vehicles by which to increase and maintain their name recognition and, by extension, their hold on their seats. Indeed, as one *Los Angeles Times* article pointed out for example, between January 1, 1995, through Aug. 19, 1996, the top spending 20 California Assembly Members alone spent a combined total of \$1.3 million during this period on taxpayer funded frank mail. See Paul Jacobs and Virginia Ellis, *Legislators Bypass Mass*

Mailing Ban: Loopholes Used to Send 35 Million Pieces at Taxpayer Expense, L.A. Times, Aug. 27, 1996, at A1; see also *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) (stating that references to other locales is relevant in First Amendment challenges). As this article points out, this staggering amount of taxpayer funded mail sent to California voters during this period:

... [D]emonstrates the inventiveness of elected officials in finding ways to use tax funds to promote themselves and maintain their grip on public office. ...

... [T]he mailings are used most by legislators facing a stiff challenge in their district or trying to advance to another office. ...

And direct mail to voters plays a crucial role in winning elections "Nine times out of 10, campaigns are won by the candidate who did the most mail."

L. A. Times, Aug. 27, 1996.

In yet another California example, one Assembly incumbent sent out \$24,000 worth of taxpayer funded mail two weeks prior to a recall election this Member faced. See *A Behind-the-Scenes Look at Orange County's Political Life: Foes Frankly Furious at Allen's Late Mailers at Taxpayers' Expense*, L.A. Times, Nov. 5, 1995.

Yet more recent evidence also underscores the fact that the ability of challengers to unseat incumbent officeholders is directly related to the amount of money they are able to raise and spend. One such study concluded as follows:

In fourteen lower-chamber legislative elections in states between 1990 and 1994, as well as in six U.S. Congressional elections between 1986 and 1996, the amount of money raised by the challenger was

consistently the single most important variable associated with electoral competition.

Michael Malbin and Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States*, at 166 (The Rockefeller Institute Press 1998). Professor Malbin's study also concluded:

Our studies of twenty-two legislative elections confirm a conclusion long known among political scientists: The most important financial difference between competitive and uncompetitive races lies in the money raised by the challenger. There is also no question, either among political scientists or among politicians, that early money is the hardest to raise, as well as being the most important for establishing a "take-off" threshold for potentially viable campaigns to become serious.

. . . [W]e know that the sources available to incumbents, and to well-established, competitive nonincumbents, will not be there to help most challengers get started.

Rich candidates, of course, can always provide their own seed money.

Id. at 174.

Indeed, Professor Malbin's findings indicate that if the old adage that "money [is] the mother's milk of politics" is in fact true, courts should be vigilant in ensuring that incumbent officeholders do not "own[] the dairy." *Fair Political Practices Commission v. Superior Court*, 25 Cal. 3d 33, 54 (1979) (Bird, C.J., dissenting) (striking down California Political Reform Act's ban on lobbyist contributions). *This case, of course, involves a nonincumbent first-time candidate for statewide political office.*

Accordingly, the court below properly rejected the "scintilla" of evidence produced by Missouri in defense of that state's campaign contribution scheme: namely, the "conclusory and self-serving" affidavit of an incumbent state Senator. *Shrink Missouri Government PAC v. Adams*, 161 F.3d at 522. This evidence alone simply does not satisfy the "heavy burden" (*Nixon v. Administrator of General Services*, 433 U.S. at 506) the government and its amici carry to demonstrate to a court that the recited harms of corruption or the appearance of corruption "are real . . . and that regulation [contribution limits] will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. Federal Communication Commission*, 512 U.S. 622, 664 (1994).

II

MORE NARROWLY TAILORED MEANS EXIST TO PREVENT ACTUAL AND APPARENT CORRUPTION

In order to survive strict scrutiny, a statute regulating fundamental rights must be "narrowly tailored" to serve a compelling governmental interest. *American Constitutional Law Foundation*, 119 S. Ct. at 642 n.12; *McIntyre*, 514 U.S. at 347. To this end, "government must curtail speech *only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted the regulation.*" *Massachusetts Citizens for Life*, 479 U.S. at 265 (emphasis added).

In the context of campaign finance, the only governmental interest that this Court has accepted as "compelling" is the prevention of actual or apparent corruption. *National Conservative Political Action Committee*, 470 U.S. at 496-97. Moreover, this Court has defined corruption narrowly, to include *only* a financial quid pro quo; in other words, dollars exchanged for political favors. *National Conservative Political Action Committee*, 470 U.S. at 497; *see by analogy, McCormick v.*

United States, 500 U.S. 257, 273 (1991) (finding campaign contributions made in exchange for an “*explicit promise*” of favorable future action as a violation of the Hobbs Act as opposed to those contributions made with *anticipation* of favorable future action) (emphasis added).⁴

Nearly a quarter century has passed since this Court decided *Buckley* and much has changed since that time with respect to the regulation of election-related activities. More specifically,

⁴ In fact, the major foundation on which the government and its amici base their argument is what they characterize as the “common sense recognition” that large campaign contributions cause “harm” or “corrupt” our system of government. This Court has rejected similar attempts to make such bald, categorical assessments of corruption based solely on the existence of campaign contributions in our electoral system *without evidence of actual quid pro quo corruption*:

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit . . . [crimes] when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of [the indicia of criminal intent]. . . . To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

McCormick, 500 U.S. at 272. Thus, the government’s assertion that the mere existence of “large” campaign contributions in our electoral system is indicative of corruption is simply unsupportable.

the rigorous enforcement of bribery statutes and the adoption and enforcement of comprehensive disclosure schemes by all 50 states—coupled with the intense scrutiny by the press with respect to the financing of elections—illustrates that the “blunderbuss approach” of contribution limits “cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent.” *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in part and dissenting in part).

Simply stated, and as discussed more fully below, more narrowly tailored means exist to prevent actual and apparent corruption.

A. Bribery Statutes Exist and Are Utilized to Prevent Actual Corruption

Missouri has enacted a comprehensive scheme of criminal bribery statutes intended to precisely address the situation of “quid pro quo” corruption. More specifically, Missouri Code section 576.010 provides in relevant part:

1. A person commits the crime of bribery of a public servant if he knowingly offers, confers or agrees to confer upon any public servant any benefit, direct or indirect, in return for:

(1) The recipient’s official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant; or

(2) The recipient’s violation of a known legal duty as a public servant.

In addition, Missouri Code section 576.020 provides in relevant part:

1. A public servant commits the crime of acceding to corruption if he knowingly solicits, accepts, or agrees to accept any benefit, direct or indirect, in return for:

(1) His official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant; or

(2) His violation of a known legal duty as a public servant.

Additionally, as part of the requisite oath of office for elected members of the Legislature, the Missouri Constitution requires such members to take an oath committing to honest services during their tenure and the commitment not to take any money or other gifts in exchange for the performance or nonperformance of official duties. Missouri Constitution, Article III, section 15. Far from being a relic of Missouri law, the annotations to these statutory and constitutional provisions indicate their vitality.

As these Missouri bribery laws are undoubtedly more narrowly tailored means by which to address the precise problem of corruption in public service, the contribution limits at issue in this case are overbroad as they "infringe[] on [many instances of innocent] speech that does not pose the danger that has prompted regulation." *Massachusetts Citizens for Life*, 479 U.S. at 265.

In addition, recent experiences in California also illustrate the ability of bribery laws "to punish and deter the corrupt conduct the [g]overnment seeks to prevent" through limits on campaign contributions. *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in part and dissenting in part). In the early 1980's, the United States Department of Justice began what was to be an approximate eight-year investigation into suspected corruption in the California Legislature. As explained in the *Sacramento Bee* (*It Wasn't Easy to Sting Capitol*, June 19, 1994), this investigation resulted in the convictions of four state legislators, several appointed officials and one lobbyist. Generally, these convictions were based on various federal and state statutes and legal theories such as the

Hobbs Act (19 U.S.C. § 1951), "RICO" (18 U.S.C. § 1962), "mail fraud" (18 U.S.C. § 1341), "money laundering" (18 U.S.C. § 1956), and "bribery" (California Penal Code § 86). See also *United States v. Montoya*, 945 F.2d 1068 (9th Cir. 1991); *United States v. Carpenter*, 961 F.2d 824 (9th Cir. 1992); and *United States v. Jackson*, 72 F.3d 1370 (9th Cir. 1995).

Moreover, far from being isolated to the above instances, there are many other examples of the government convicting public officials and others from multiple jurisdictions-- including Missouri--under such bribery theories. See, e.g., *United States v. Simmons*, 154 F.3d 765 (8th Cir. 1998) (Missouri political consultant); *United States v. Griffin*, 154 F.3d 762 (8th Cir. 1998) (Missouri speaker of the House); *United States v. Bereano*, 161 F.3d 2 (4th Cir. 1998) (Maryland lobbyist); *United States v. Woodard*, 149 F.3d 46 (1st Cir. 1998) (Massachusetts House member); *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996) (Massachusetts lobbyist); *McCormick v. United States*, 500 U.S. 257 (West Virginia legislator); see also *The Fresno Bee*, *Big Names Surface in Operation Rezone Case*, Jan. 1, 1999, concerning the recent convictions of certain California municipal officials regarding the same.⁵

These examples illustrate that bribery laws are more narrowly tailored means to prevent actual corruption. Indeed, "bribery laws are designed to punish and deter the corrupt conduct the Government seeks to prevent under [contribution limits]." "In light of [this] alternative[], wholesale limitations that cover contributions having nothing to do with bribery--but with speech central to the First Amendment--are not narrowly tailored." *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in part and dissenting in part).

⁵ Although Amici are certainly not advocating the federalization of state and local bribery and ethics crimes, Amici raise these examples as evidence of the simple fact that more narrowly tailored means exist to prevent actual corruption.

**B. Campaign Contribution Disclosure Provisions
Exist to Prevent the Appearance of Corruption**

In the 23 years since this Court decided *Buckley*, every state in the Union has adopted a comprehensive statutory scheme requiring candidates to disclose contributions and expenditures before and after elections. Most of these states require the itemization of individual donors who give over a certain threshold amount (usually between \$25 and \$100) and also prohibit anonymous and "laundered" contributions (i.e., contributions made through straw men). Michael Malbin and Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States*, *supra*, at 13-14.

Many states also impose disclosure obligations on contributors who contribute a cumulative threshold amount. See *Corporate Political Activities 1998: Complying with Campaign Finance, Lobbying and Ethics Laws*, Practising Law Institute Course Handbook Series, Chapters 17 and 20. Thus, in these states, contributions are "double" reported. In California for example, individuals, corporations, and other entities that contribute a cumulative total of \$10,000 or more in a year to candidates, political action committees and ballot measure committees combined, must file semi-annual "Major Donor" disclosure reports. See FPPC Advice Letter to Randall Zakreski (08/11/93) No. I-93-296. Thus, a person who qualifies as a "Major Donor" in California discloses all of his or her contributions on his or her Major Donor Report, and such contributions are also disclosed on the recipient candidate's report. Other states having "double disclosure" laws include Hawaii, Maryland, Nebraska, Pennsylvania, Utah, Washington, and West Virginia. See *Corporate Political Activities 1998: Complying with Campaign Finance, Lobbying and Ethics Laws*, *supra*, Chapter 20 at 7-8.

In addition, many states and the Federal Election Commission publish, or are beginning to publish, campaign disclosure reports on the internet. This development will no

doubt provide for more efficient disclosure particularly to the "thousands" or "millions" of people who use the internet as an information source. See *Reno v. American Civil Liberties Union*, 117 S. Ct. at 2335. Indeed, a search on the world wide web indicates that there are hundreds of organizations on the web whose sole purpose is to publish information on campaigns and elections and many such web sites focus particularly on the financing of elections. The web sites established by the California Voter Foundation (www.calvoter.org) and the Center for Responsive Politics (www.crp.org) are just two examples.

The significance of these laws--and, just as important, the utilization of the information provided as a function of such laws--is not so much their intricacies, but rather, the fact that their existence is clear evidence that more narrowly tailored means exist to prevent the appearance of corruption rather than the "blunderbuss approach" of campaign contribution limits. *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in part and dissenting in part). Indeed, as this Court has noted in analogous circumstances, the "less intrusive" means of preventing fraud in the charitable solicitation context are "penal laws used to punish [illicit] conduct directly" and "disclosure" laws. *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 (1980).

Again, examples from California illustrate this clearly. For instance, in a heavily contested 1994 California Assembly race, candidate Steve Kuykendall accepted a \$125,000 contribution from Philip Morris in the last days prior to the election that was properly reported pursuant to California's campaign contribution disclosure law. Although he won the election, the public reaction to this contribution caused him to refuse to accept any more tobacco money in subsequent campaigns. Moreover, far from "kowtowing" to Philip Morris as the government and its amici would undoubtedly conclude, the Philip Morris contribution in all likelihood assured Assemblyman Kuykendall's

support for anti-smoking legislation. As the *Los Angeles Times* pointed out:

And ironically, it could be the Philip Morris contribution that ensures that he backs anti-smoking legislation while in Sacramento. Otherwise, opponents could gain even more fodder for a recall.

....

"He's not going to be dumb enough to vote tobacco."

Ted Johnson, *Kuykendall Blends Pragmatism, Ideology: Legislator Says Accepting Tobacco Firm's \$125,000 Contribution Helped Him Beat Incumbent, and Vows It Won't Ease His Opposition to Smoking*, L.A. Times, Dec. 8, 1994; see also *In Legislative Races, Tobacco Is a Hotter Issue Than Ever: Several Candidates Get Burned by Foes for Taking the Industry's Donations. Some Who Accepted Gifts in the Past Are Now Shunning Them*, L.A. Times, Oct. 29, 1996.

A more recent example of disclosure adequately protecting against the appearance of corruption occurred again in California during this past 1998 gubernatorial election cycle. One highly contentious issue during that election was a ballot measure-- Proposition 5--which attempted to legalize Indian gambling operations on reservations located in California. During this campaign, the California Legislative Counsel opined that accepting donations from Indian tribes may be illegal subjecting recipients to possible criminal sanctions. See Dan Morain and Dave Leshner, *Casino Campaign Donations Questioned: Legislature's Legal Advisor Says That Lawmakers Could Face Criminal Sanctions if They Accept Contributions from Indian Gambling Operations Deemed To Be Illegal*, L.A. Times, July 3, 1998. Shortly after the issue was reported in the press, then gubernatorial candidate Gray Davis, among others, *refused to accept any more Indian tribe campaign contributions to avoid the appearance of impropriety*. See Virginia Ellis, *Labor, Trial Lawyers Pour Millions Into Davis' Coffers Funds: A Third of*

Gubernatorial Candidate's Money Comes from Two Groups That Usually Back Democrats, L.A. Times, Oct. 21, 1998.

Given these examples of campaign finance disclosure and vigilant reporting by the press, it is simply incredulous to assert the notion that disclosure is inadequate to prevent the appearance of corruption. *Not only does disclosure allow citizens to make their own judgments about a particular candidate, but such laws also allow the press and opponents to continually monitor campaign activity and alleged correlations between contributors and actions taken in public office.* Certainly, these types of disclosure laws and vigorous reporting by the press further the "discussion of public issues and debate on the qualifications of candidates [which is] integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14; see also *Grosjean v. American Press*, 297 U.S. 233, 250 (1936) (observing that an "informed public opinion is the most potent of all restraints upon misgovernment").

Amici therefore submit that the contribution limits at issue in this case fail strict scrutiny as they are not narrowly tailored:

If a small minority of political contributions are given to secure appointments for the donors or some other *quid pro quo*, that cannot serve to justify prohibiting all large contributions, the vast majority of which are given not for any such purpose but to further the expression of political views which the candidate and donor share. Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the government interest in the small minority of contributions that are not innocent.

Colorado Republican, 116 U.S. at 2329 (Thomas, J., concurring in part and dissenting in part).

CONCLUSION

The judgment of the Eighth Circuit should therefore be affirmed.

DATED: May, 1999.

Respectfully submitted,

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APPENDICES

Appendix A-1

Los Angeles Times
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Wednesday, December 9, 1998

Metro Desk

Justices May Revive Cap on Contributions Politics:

**Appeals Court Considers Reinstatement
of Prop. 208, the 1996 Ballot Measure To
Strictly Limit Campaign Fund-Raising**

DAN MORAIN
TIMES STAFF WRITER

SAN FRANCISCO -- After a 1998 political campaign in which state candidates spent more than \$200 million, a federal appellate court Tuesday considered reinstating a far-reaching ballot initiative that imposed strict contribution limits.

The three-judge panel of the U.S. 9th Circuit Court of Appeals is deciding the fate of Proposition 208, which was approved by California voters two years ago. The measure limited individual contributions to state Senate and Assembly candidates at \$250 and to candidates for statewide offices at \$500. If a candidate agreed to spending limits, the individual contribution levels could double.

The initiative's defenders appealed to the circuit court after U.S. District Judge Lawrence Karlton of Sacramento issued an injunction in January blocking Proposition 208. Karlton concluded that the measure's tough contribution and spending limits denied candidates their 1st Amendment right to free speech.

On Tuesday, Judge Stephen Reinhardt repeatedly signaled his belief that the limits appeared to infringe on candidates' ability to campaign. The other two judges seemed more willing to consider upholding the initiative.

"Judging from the questions, two judges seem oriented toward reversing [Karlton], and one toward affirming," said

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UCLA law professor Daniel H. Lowenstein, an opponent of the initiative who watched the arguments.

Apparently looking for middle ground, Judge Michael D. Hawkins wondered whether the case could be turned over to the California Supreme Court to rewrite portions of the measure to make it constitutional.

Without Proposition 208, campaign fund-raising and contributions in California have continued to skyrocket. Donations of \$100,000 by individuals and corporations to candidates for statewide office are common. Legislative leaders also pull in six-figure donations from individual sources.

Candidates in this year's general election campaign for governor and other statewide offices raised at least \$95 million, according to the California Voter Foundation. Candidates for the 100 legislative contests raised about \$75 million. Add in primary spending, and the tab for this year's campaigns tops \$200 million--not counting ballot initiatives, which weren't covered by Proposition 208.

Under the initiative, a gubernatorial candidate could raise no more than \$14 million. Without the limits in place this year, Democratic Gov.-elect Gray Davis raised about \$30 million. His Republican opponent, Atty. Gen. Dan Lungren, raised about \$22 million.

At several points during Tuesday's court debate, the argument veered into discussions about this year's campaigns and wealthy former Northwest Airlines Chairman Al Checchi, who spent about \$40 million--most of it his own money--in his failed effort to win the Democratic gubernatorial nomination. The initiative would not have blocked wealthy people from spending their own money on their campaigns.

Proposition 208's opponents include many Republican and Democratic politicians and many of their supporters, including organized labor, represented Tuesday by San Francisco

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attorney Joseph Remcho, and the California Pro-Life Council, represented by attorney Jim Bopp from Terre Haute, Ind.

The initiative's defenders included the state Fair Political Practices Commission and Los Angeles attorney Bradley S. Phillips, who represented the authors, former acting Secretary of State Tony Miller and former California Common Cause director Ruth Holton.

Phillips and FPPC attorney Lawrence Woodlock defended the initiative as a legitimate effort on the voters' part to limit campaign spending and curtail corruption by reducing the size of donations.

"This is one of the aspirations of 208--to put an end to the arms race," Woodlock said.

In his questioning, Hawkins focused on the initiative's contribution caps, noting that Oregon, Washington and Arizona have contribution limits and that \$1,000 is the maximum individual donation permitted by federal election law.

Attorneys attacking the initiative--and Judge Reinhardt--noted that the \$1,000 limit was imposed on federal campaigns 24 years ago, when the average congressional race cost \$73,000. At the time, only 5% of the donations exceeded \$1,000. Today as much as 85% of all donations in California political races exceed the restrictions of Proposition 208, noted Bopp.

On the counsel table, Bopp displayed a copy of a book titled "Bribes" by John T. Noonan, one of the judges on Tuesday's panel.

Bopp said some of the book's passages support his contention that campaign contributions should not be curtailed, as long as they are fully disclosed. Noonan, however, seemed skeptical about the attacks on the initiative. When one lawyer

Appendix A-4

opposing Proposition 208 said the limits would deny candidates the right to wage a “meaningful mail campaign,” Noonan interrupted:

"A meaningful mail campaign?" he said. "I've never known a meaningful mail campaign . . . People throw it away."

Appendix B-1

Official, Candidate and Controlled Committee Campaign Statement - Long Form

(Statistical Code Section 90000 - 94190.3)

☒ Pre election Statement

☐ Required Post-election Statement (which is completed from CDS to this statement)

☐ Special Old Year Campaign Report

☐ Special Annual Report

☐ Transition Statement (which is completed from CDS to this statement)

**Official, Candidate, and Controlled Committee
Included in this Statement**
Not a Representative of the State

Gray Davis

Governor

9911 W. Pico Blvd., #980

Los Angeles

CA 90035

California for Gray Davis

9911 W. Pico Boulevard, #980

Los Angeles

CA 90035

Steven Ourley

11555 W. Olympic Boulevard #100

Los Angeles

CA 90064

Ballot numbers printed

Date 02/18/98

Signature 02/18/98

Date of Election

(Month, Day, Year)

06/02/98

Ballot numbers printed

Date 02/18/98

Signature 02/18/98

Date of Election

(Month, Day, Year)

06/02/98

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**Official, Candidate, and Controlled Committee
Included in this Statement**

Appendix B-2

Schedule A (Continuation Sheet) Monetary Contributions Received					
NAME OF CONTRIBUTOR OR CANDIDATE AND CONTRIBUTED COMMITTEE Gray Davis, Californians for Gray Davis					
DATE RECEIVED	FULL NAME AND ADDRESS OF CONTRIBUTOR (Print name of donor, organization or trust, and complete address including zip code. Do not include name of candidate.)	OCCUPATION AND EMPLOYER (Print occupation and employer of donor.)	AMOUNT RECEIVED (Indicate amount.)	DATE RECEIVED (Indicate date.)	CUMULATIVE TO DATE (Indicate date.)
05/11/98	Am Institute for Public Safety 9455 Wilshire Blvd., #1010 Los Angeles, CA 90036		150.00	05/16/98	150.00
05/09/98	American Animal Hospital 3660 Feralite Blvd. Fremont, CA 94536		500.00		500.00
05/06/98	American Shared Hospital Services P O Box 1 Modesto, CA 95353		5,000.00		5,000.00
05/14/98	Aster Audiotext, Inc. 8670 Wilshire Blvd., 2nd Fl. Beverly Hills, CA 90211		500.00		500.00
05/12/98	Martin S Appel 10940 Wilshire Blvd., 7th Fl Los Angeles, CA 90024	Attorney Mill, Wynne, Troop et al.	5,000.00		5,000.00
05/01/98	Send B April 561 Moreno Av Los Angeles, CA 90049	Managing Partner Shadden Arpe Slate et al	250.00		250.00
SUBTOTAL \$			11,400.00		

Schedule E (Continuation Sheet) Payments and Contributions (Of, Then Loans) Made					
NAME OF CONTRIBUTOR OR CANDIDATE AND CONTRIBUTED COMMITTEE Gray Davis, Californians for Gray Davis					
DATE RECEIVED	FULL NAME AND ADDRESS OF CONTRIBUTOR (Print name of donor, organization or trust, and complete address including zip code. Do not include name of candidate.)	OCCUPATION AND EMPLOYER (Print occupation and employer of donor.)	AMOUNT RECEIVED (Indicate amount.)	DATE RECEIVED (Indicate date.)	CUMULATIVE TO DATE (Indicate date.)
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05/01/98	Send B April 561 Moreno Av Los Angeles, CA 90049	Managing Partner Shadden Arpe Slate et al	250.00		250.00
SUBTOTAL \$			11,400.00		

Appendix B-3

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NAME OF CONTRIBUTOR OR CANDIDATE AND CONTRIBUTED COMMITTEE Gray Davis, Californians for Gray Davis					
DATE RECEIVED	FULL NAME AND ADDRESS OF CONTRIBUTOR (Print name of donor, organization or trust, and complete address including zip code. Do not include name of candidate.)	OCCUPATION AND EMPLOYER (Print occupation and employer of donor.)	AMOUNT RECEIVED (Indicate amount.)	DATE RECEIVED (Indicate date.)	CUMULATIVE TO DATE (Indicate date.)
05/11/98	Am Institute for Public Safety 9455 Wilshire Blvd., #1010 Los Angeles, CA 90036		150.00	05/16/98	150.00
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05/01/98	Send B April 561 Moreno Av Los Angeles, CA 90049	Managing Partner Shadden Arpe Slate et al	250.00		250.00
SUBTOTAL \$			11,400.00		

Appendix B-6

Schedule E
(Continuation Sheet)
Payments and Contributions
(Other Than Loans) Made

SCHEDULE E (cont.)
CAUTION: Do not check this box unless you are reporting a contribution to a candidate or committee.
Page 8 of 164
ID NUMBER 970057

NAME OF OFFICER, CANDIDATE OR COMMITTEE: Alfred A. Checchi, Checchi for Governor

NAME AND ADDRESS OF PAYEE, OR NAME OF CONTRIBUTOR	DATE OF PAYMENT OR CONTRIBUTION	AMOUNT	DESCRIPTION OF PAYMENT
AMS Response 16105 Qundry Avenue Paramount, CA 90723	03/18/98	8,516.00	G
Laure Arciniaga 5757 Wilshire Blvd., Suite #481 Los Angeles, Ca. CA 90036	05/16/98	193,148.78	L
Arroyo's Mexican Cafe 524 B. Center Street Stockton, CA 95203		6,425.90	G
AT&T PO Box 10192 Van Nuys, CA 91410-0192		1,616.26	G
		13,392.82	G
SUBTOTAL \$			221,089.76

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Schedule E
(Continuation Sheet)
Payments and Contributions
(Other Than Loans) Made

SCHEDULE E (cont.)
CAUTION: Do not check this box unless you are reporting a contribution to a candidate or committee.
Page 12 of 164
ID NUMBER 970057

NAME OF OFFICER, CANDIDATE OR COMMITTEE: Alfred A. Checchi, Checchi for Governor

NAME AND ADDRESS OF PAYEE, OR NAME OF CONTRIBUTOR	DATE OF PAYMENT OR CONTRIBUTION	AMOUNT	DESCRIPTION OF PAYMENT
CBSN c/o Heleh & Associates 1644 Taylor Street, Suite 4300 San Francisco, CA 94133 ID #597011	03/18/98	1,500.00	L
California Asian American Voter Guide c/o Heleh & Assoc. 1644 Taylor Street, Suite 4300 San Francisco, CA 94133 ID #596018	05/16/98	14,000.00	L
California Democratic Party 9200 Sunset Blvd., Suite #415 Los Angeles, CA 90069		1,640.00	G
California Latino Voter's Guide 5031 N. Figueroa St. 25 Los Angeles, CA 90042 ID #596004		28,517.76	L
California Parking PO Box 2882 San Francisco, CA 94126		322.00	G
SUBTOTAL \$			45,979.76

Appendix C-1

Los Angeles Times
Copyright 1996 / The Times Mirror Company
Tuesday, August 27, 1996
Metro Desk
Legislators Bypass Mass Mailing Ban
Government: Loopholes Used to Send 35
Million Pieces at Taxpayer Expense
PAUL JACOBS; VIRGINIA ELLIS
TIMES STAFF WRITERS

POLITICAL PERSUASION. Money and patronage in California. One in an occasional series

Californians in 1988 voted for an initiative that in the plainest of language outlawed mass mailings by elected officials at public expense.

Since then, however, state lawmakers have sent out more than 35 million pieces of taxpayer-financed bulk mail. Much of it came from officials facing tough elections.

Legislators have spent almost \$6 million on well-organized "communications" programs by taking advantage of regulations that created major loopholes in the law, the Times has found.

The mailings have accelerated in the Assembly during the current two-year session, primarily because Republican members have sent more than 10 million pieces to constituents. Records show that the three most prolific GOP members sent out more mail than all the Democrats combined.

Many mailers are highly political in tone and baldly self-promotional, touting partisan views on such hot-button issues as welfare and crime, gas tax cuts and illegal immigration.

A number appear frivolous, such as computer-generated letters urging constituents to "Take a Hike!" to celebrate National Parks and Recreation Month.

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Others are largely informational, some without discernible legislative purpose, such as notices of free eye exams and invitations to have children fingerprinted. One letter marks the 23rd anniversary of the end of the Vietnam War, another the fifth anniversary of the Gulf War.

What happened in the eight years since passage of Proposition 73 shows how the expressed will of the state's voters can be circumvented and diluted. It also demonstrates the inventiveness of elected officials in finding ways to use tax funds to promote themselves and maintain their grip on public office.

Defenders say mass mailings help them keep in touch with constituents, who welcome the contact. They also say exemptions allowed by the state's political watchdog agency permit them to send as many letters as they want, providing they do not exceed their budget.

"They give you a chunk of money. You can do a number of things with it," said Assembly Majority Leader James E. Rogan (R-Glendale), who has sent more than 620,000 pieces of mail this session. "You can take junkets or you can try to keep your constituents posted on what's going on. I don't take junkets."

Now, because of criticism from some legislators and a flap over a provocative GOP mailer on the new three-strikes law, the Fair Political Practices Commission is considering whether rules changes are needed.

A Powerful Perk

Free mailing privileges have long been a prime perk of legislators—one that challengers say gives an unfair edge to incumbents. And the party in control in each house, through the power of the purse, has always been able to fire out a larger volume of mail than the minority party.

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The 1988 ballot measure sought to change all that with the simple admonition: "No newsletter or other mass mailing shall be sent at public expense."

Mass mailing, said the authors of Proposition 73, amounted to electioneering at public expense. "The mailings were little more than thinly disguised campaign pieces," said co-author Sen. Ross Johnson (R-Irvine).

Even a rather neutral piece, such as an opinion survey or list of fire safety tips, can help a lawmaker with name recognition in his district. "Your name is the name of the game," said another co-author, Sen. Quentin L. Kopp (I-San Francisco).

Mail records, obtained under the Legislative Open Records Act, show that after passage of the initiative, the volume of bulk mail sent out by the state Senate dropped sharply and has never rebounded.

But in the Assembly, the amount of mail had been building slowly under the Democrats, only to shoot up suddenly after the Republicans gained a majority in the 1994 elections.

Over the last 21 months, records show, GOP members have engaged in a mass mailing spree, sending out more than six times as much as Assembly Democrats, largely targeted toward districts with contested races.

Five Democrats, some facing stiff election fights, have sent at least 100,000 pieces of mail. But no Democrats are among the top 20 mail users identified by a Times computerized analysis of mail and postage records.

The ban was never popular among legislators, many of whom say that communication with voters is a vital part of their job. And the line between legislators informing their constituents and promoting their own political fortunes is not always a clear one.

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Immediately after passage of Proposition 73, elected officials started complaining that the prohibition, if strictly enforced, would bring government to a halt--and might even prevent the mailing of income tax refunds and voter information pamphlets.

The Fair Political Practices Commission responded by writing rules intended to keep the government's doors open for business by allowing broad exceptions to the law.

These rules reinforced the ban on slick newsletters featuring photos of lawmakers and flattering articles on their accomplishments.

But the regulations opened the way for other sorts of mass mailings that critics say fulfill much the same purpose. For example, elected officials could mail as many notices of public meetings, such as town hall forums, as they wished.

This, Johnson warned at the time, was "a very major loophole that my colleagues and I in the California Legislature will be driving Mack trucks through very quickly."

Proposition 73 allowed each legislator to send up to 200 copies of a given letter in one month without violating the mass-mailing ban. But after a series of rulings by the FPPC, lawmakers quickly figured out they could ship thousands of computer-generated letters at a time.

For example, one member sent about 70 different letters one month in batches of 200 or less--more than 14,000 letters in all.

The FPPC commissioners "distorted Proposition 73 in the regulations. They created a means of evading it," Kopp said.

In recent years, Johnson and Kopp have turned to mass mailings, but the numbers are relatively small and neither has sent out bulk mail close to election day.

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Mass Mailing Machine

Mass mailing has become institutionalized in the Assembly and the Senate, but with a difference.

Senators are allowed to spend no more than \$8,800 annually and cannot make large-scale mailings in the three months before an election.

Assembly members can spend as much as they want of their \$240,000-a-year basic office budget on mailing. Until this month, members were allowed to send out publicly funded mailers right up until election day.

The legislative staffs of both houses write the mailers, and these are reviewed for conformance with FPPC regulations. The letters are printed and mailed from legislative offices at public expense.

The party caucuses encourage members to take advantage of these services.

"Unsolicited mail can provide different types of outreach for our Assembly members," states an internal memorandum earlier this year from the Assembly's Republican Caucus. It suggested that the names of office visitors, new homeowners and newly registered voters in a legislator's district can be computerized so they can be contacted for town hall meetings or future mailings.

In practice, the Times found, the mailings are used most by legislators facing a stiff challenge in their district or trying to advance to another office.

Republican Assemblyman Peter Frusetta of Tres Pinos has sent out more publicly funded mail in the last 21 months than any other lawmaker--more than 665,000 pieces so far this session. A lifelong rancher who calls himself the "cowboy in the Capitol," he faces a tough rematch against a Democratic

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opponent he narrowly defeated two years ago. The outcome could determine which party controls the Assembly.

Frusetta sends out many computer-generated letters in batches of 200 letters at a time. In late June, he mailed out more than 14,000 of these letters. One batch, paying homage to the U.S. flag, called for support of a federal constitutional amendment to make flag desecration a crime. Another praised legislation to bar local school boards from using taxpayer funds on behalf of candidates or ballot measures. "As a taxpayer I don't believe my tax dollars should be used for political purpose and I hope you agree," he wrote.

Frusetta said in an interview: "Lots of people come up to me and say they like the letters. They say they are informative. That encourages me to continue."

"I see it as a way to keep the constituents informed, to keep their interest alive, to get them involved in controversial issues. I see it as a public service."

Second to Frusetta in mailing is Rogan, the Assembly majority leader, who faces a millionaire Democratic businessman in a key race this November in the partisan struggle for control of the U.S. House of Representatives.

The Proposition 73 restrictions were designed in part to prevent lawmakers from using mailers for partisan purposes. And the FPPC tried to eliminate self-serving statements in mailers by barring personal pronouns such as "I," "me" or "my."

But one of Rogan's letters sent out to 43,000 constituents attacked "the Democrat-controlled Senate" for stalling or killing "important job-creating legislation that passed the Assembly."

Under the FPPC's rules, Rogan could not sign those letters, yet he was clearly identified as the author. His name

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appeared on an official-looking letterhead in large capital letters, because the rules allow it.

Last spring, Democratic Assemblyman Willard H. Murray Jr. of Paramount sent out more than 100,000 pieces of subsidized mail to his district, most of them fliers suitable for posting on household bulletin boards, with information on local recreational programs and fire safety.

This mail--the only large-scale mailings Murray sent out all session--went out in the final weeks before he lost narrowly to then-Assemblywoman Juanita McDonald (D-Carson) and others in a race for a vacant congressional seat.

Murray denied that the mailer was used to enhance his election chances. "We got behind [in the mailing], and they all wound up going out then," he said.

Rethinking the Rules

Co-author Kopp and other lawmakers have been urging the Fair Political Practices Commission to reexamine the rules that allowed lawmakers to mail millions of mass mailers, despite the ban.

The commissioners are promising to reconsider the regulations, perhaps as soon as their November meeting, said commission general counsel Steven G. Churchwell.

The review is prompted by Kopp and others and by a recent flap over a "Save Three Strikes" mailer sent out by a number of Republican Assembly members.

The stridently pro-GOP mailer attacks "soft-on-crime politicians" led by Senate President Pro Tem Bill Lockyer (D-Hayward) for "doing all they can to destroy the anti-crime gains we have made these past two years."

But Churchwell cautions that it will be difficult to craft rules to end mailings that appear too partisan or are too

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flattering to the senders. "It's easy to say the goal is stop fluff pieces," he said. "How do you do that?"

University of Virginia professor Larry J. Sabato, who has written about congressional abuse of mailing privileges, said: "Some of the most ingenious people in the world are attracted to politics. And there will never be a way to design a law to keep [mailings] from being abused."

The party in power sees to it that its members have the resources to get out the mail, said Democratic campaign consultant Richie Ross, who helped plan mail programs as the Assembly's chief administrative officer under Democratic Speaker Willie Brown.

"Traditionally what happened was the vulnerable incumbents sent out more mail than the non-vulnerable incumbents, if your party was in control of the numbers," Ross said.

And direct mail to voters plays a crucial role in winning elections, he said. "Nine times out of 10, campaigns are won by the candidate who did the most mail."

Before passage of Proposition 73, officeholders were barred from sending mass mail once they declared for public office. After enactment of the initiative, the Senate imposed a rule of its own, banning mass mail in the three months before an election.

The Assembly had no such rule until this month, when Speaker Curt Pringle (R-Garden Grove) proposed one prohibiting all Assembly members from sending taxpayer-funded mass mail within 60 days of an election "to remove the potential to misconstrue any publicly financed mailings as intended for political purpose."

A spokesman for Pringle said Republicans had an informal rule barring mailings any closer than six weeks before the March 26 primary election.

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A score of GOP members ignored this policy, sending 874,000 pieces in that period, according to logs at the Assembly Reproduction Center.

During the same period, seven Assembly Democrats mailed out 208,000 pieces, including those sent out by Murray.

Democrats have objected to Pringle's 60-day cutoff proposal, and the Assembly Rules Committee agreed to a compromise, 45-day cutoff—a decision that came as lawmakers, primarily Republicans, were already deluging their districts with mail.

Assemblyman Jim Cunneen of Cupertino, a first-term Republican, has already sent more than 565,000 pieces of mail this session, many announcing town hall meetings with Cunneen.

Cunneen, who is facing former California Teachers Assn. President Ed Foglia in another key Assembly race, said: "You don't have to come to a fund-raiser to ask me a question."

Foglia complains that Cunneen's mailers have made his challenge more difficult.

"It's a tremendous advantage," he said. "I just thought that under Proposition 73, this was taken care of."

Publicly Financed Mail

Despite a ban on mass mailing, state legislators have taken advantage of loopholes in the law to increase the amount of mail they have been sending out at public expense. Since gaining a majority in the Assembly two years ago, Republican members have increased their mail dramatically.

Total Assembly mailing cost

Source: Assembly Daily File (1990-1991); Assembly Rules Committee (1995)

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Note: Includes all postage by individual members, does not include printing or processing costs. Totals for 1995 are from unaudited, unreconciled data.

Top Spenders

These are the Assembly members who spent the most on mass mailings from Jan. 1, 1995, to Aug. 19, 1996.

ASSEMBLY MEMBER: 1. Peter Frusetta (R-Tres Pinos)

PIECES: 665,879

POSTAGE: \$105,618

COMMENTS: Top target of Democrats in crucial race.

ASSEMBLY MEMBER: 2. James E. Rogan (R-Glendale)

PIECES: 623,977

POSTAGE: \$101,705

COMMENTS: Running for Congress against millionaire Democrat.

ASSEMBLY MEMBER: 3. Jim Morrissey (R-Santa Ana)

PIECES: 617,171

POSTAGE: \$93,841

COMMENTS: Seeks reelection in once-Democratic district.

ASSEMBLY MEMBER: 4. Jim Cunneen (R-Cupertino)

PIECES: 565,648

POSTAGE: \$79,235

COMMENTS: Democrats threaten to target this race.

ASSEMBLY MEMBER: 5. Bill Hoge (R-Pasadena)

PIECES: 496,794

POSTAGE: \$78,265

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COMMENTS: Running against popular college president.

ASSEMBLY MEMBER: 6. Jim Battin (R-La Quinta)

PIECES: 470,637

POSTAGE: \$71,700

COMMENTS: Faces ex-assemblyman in district with Democratic edge.

ASSEMBLY MEMBER: 7. Howard Kaloogian (R-Carlsbad)

PIECES: 465,555

POSTAGE: \$70,370

COMMENTS: Possible challenge by independent after primary.

ASSEMBLY MEMBER: 8. Phil Hawkins (R-Bellflower)

PIECES: 459,770

POSTAGE: \$69,702

COMMENTS: Faces ex-assemblywoman in Senate bid.

ASSEMBLY MEMBER: 9. Steven T. Kuykendall

(R-Rancho P.V.)

PIECES: 443,008

POSTAGE: \$70,643

COMMENTS: Narrow winner in 1994; has new Democratic challenger.

ASSEMBLY MEMBER: 10. Brett Granlund (R-Yucaipa)

PIECES: 442,119

POSTAGE: \$70,412

COMMENTS: Safe after winning contested GOP primary.

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ASSEMBLY MEMBER: 11. George House (R-Hughson)

PIECES: 421,618

POSTAGE: \$66,115

COMMENTS: Target of Democrats in seat they once held.

ASSEMBLY MEMBER: 12. Steve Baldwin (R-E1 Cajon)

PIECES: 408,313

POSTAGE: \$61,990

COMMENTS: Seeks reelection in once-Democratic district.

ASSEMBLY MEMBER: 13. Marilyn C. Brewer (R-Irvine)

PIECES: 383,379

POSTAGE: \$57,191

COMMENTS: Withstood primary challenge.

ASSEMBLY MEMBER: 14. Fred Aguiar (R-Chino)

PIECES: 377,842

POSTAGE: \$56,975

COMMENTS: Considered a safe bet for reelection.

ASSEMBLY MEMBER: 15. Scott Baugh (R-Huntington Beach)

PIECES: 334,932

POSTAGE: \$50,266

COMMENTS: Election law indictment clouds chances.

ASSEMBLY MEMBER: 16. Tom J. Bordonaro Jr. (R-Paso Robles)

PIECES: 310,779

POSTAGE: \$48,083

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COMMENTS: Seeks reelection in safe district.

ASSEMBLY MEMBER: 17. Brooks Firestone (R-Los Olivos)

PIECES: 292,788

POSTAGE: \$48,169

COMMENTS: No threat expected in reelection effort.

ASSEMBLY MEMBER: 18. Jim Brulte

(R-Rancho Cucamonga)

PIECES: 265,631

POSTAGE: \$39,202

COMMENTS: Stepping up to Senate in safe Republican district.

ASSEMBLY MEMBER: 19. Richard K. Rainey (R-Walnut Creek)

PIECES: 243,578

POSTAGE: \$33,848

COMMENTS: Senate race against Democratic county supervisor.

ASSEMBLY MEMBER: 20. Gary G. Miller (R-West Covina)

PIECES: 242,125

POSTAGE: \$36,804

COMMENTS: Easy time expected in reelection bid.

Source: Assembly Reproduction Center

About This Series

In this election year, control of the state Legislature is on the line. Two initiatives seeking to reform campaign fund-raising are on the November ballot. And term limits for

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the state Assembly take effect--prompted in part by rising public concern about the way politicians use incumbency to advance their careers.

In this occasional series, the Times explores how money influences governmental action and how elected officials use their positions to reward supporters and improve their prospects at the polls.

TODAY: How incumbents, particularly Assembly Republicans, are taking advantage of loopholes in a mass mailing ban to send millions of pieces to voters in their districts at taxpayers' expense.

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Los Angeles Times
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Sunday, November 5, 1995
Metro; PART-B; Metro Desk
POLITICS '95
A Behind-the-Scenes Look at Orange County's
Political Life; Foes Frankly Furious at Allen's
Late Mailers at Taxpayers' Expense

Lacking the big bucks to fight a Nov. 28 recall, embattled Assemblywoman Doris Allen is using her prerogative as a state lawmaker to dispatch a ton of mail at taxpayer expense to voters in her district.

Allen is mailing a non-political brochure, which announces a series of seven "town hall" meetings Nov. 17 and 18, to 160,000 households in the 67th District. Under state law, the mass mailing is allowable as long as the lawmaker's name appears just twice--announcing the meeting, and as part of a return address.

At 15 cents apiece, the mailing will cost Allen's office budget \$24,000. While the move doesn't violate state law, recall proponents say she is trampling a cardinal tenet of Assembly Republicans--thou shall not use franking privileges within six weeks of an election.

"It's no secret what she's doing," grouched Jeff Flint, a recall organizer. "She's low on funds so she's campaigning against the recall at taxpayer expense." The recall was launched after Allen cut a deal with Assembly Democrats to have herself elected Speaker, in what GOP leaders called a betrayal of the party. She has since resigned the Speaker's post.

Gil Ferguson, a former Orange County assemblyman helping Allen fight the recall, countered that the town hall

Appendix D-2

meetings will simply give Allen a chance to set the record straight on a variety of issues.

County Republican leaders "have cut off her money. Now they're objecting to her trying to get the truth out to her own constituents," Ferguson said.

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The Sacramento Bee

Copyright 1994

Sunday, June 19, 1994

MAIN NEWS

**It Wasn't Easy to Sting Capitol
Obstacle-Plagued 8-Year Effort
Dan Bernstein Bee Capitol Bureau
Capitol Sting Operation**

The sun had just come up that Friday in the late summer of 1987, and FBI agents in Sacramento were already at work, hoping that a big break in their Capitol sting operation would come waltzing through the door.

The agents had set up a ruse to lure a burly, astute state Senate aide named John Shahabian into the sprawling federal complex that houses their offices on Cottage Way at 7 a.m.

Although Shahabian arrived on time, it took nearly 14 hours of coaxing, prodding and threatening before authorities secured his cooperation as a government informant in the undercover operation. Until then, the FBI was having trouble penetrating corruption at the highest levels of the Legislature because it lacked an insider whom lawmakers trusted.

"At different parts in our discussion, I almost ended it because it wasn't clear to me that he was going to be 100 percent truthful," recalled James Wedick Jr., the lead FBI agent in the case. "If he was going to [cooperate], he was going to have to demonstrate that day his commitment."

Shahabian finally agreed to begin wearing a hidden recording device the very next day and to tape his conversation with a state senator. With that, the investigation flourished and ultimately resulted in the convictions of more than a dozen lawmakers, legislative aides, lobbyists, and other public figures.

The final convictions came Thursday, when a Sacramento federal jury returned guilty verdicts against state Senator

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Frank Hill, R-Whittier, and former Democratic legislative aide Terry Frost on extortion and conspiracy charges.

While federal prosecutors chalked up a perfect record of convictions, the eight-year investigation was fraught with obstacles and headaches.

Extraordinary restrictions on the undercover probe were imposed by top federal officials in Washington. Key witnesses refused to talk. Records at the Capitol were destroyed.

"There were times where you just got fed up banging your head against a wall," said Assistant U.S. Attorney John Vincent. "Sometimes I would come back here, slump in my chair and think, 'God, why bother?'"

Because of the public's low regard for politicians, some defense lawyers have claimed that legislators and other Capitol figures were an easy mark--particularly when they were captured on video and audio tapes.

But prosecutors said they never thought any of the cases would be easy, because they were operating in a legal gray area of duly reported campaign contributions.

"We all felt these cases would be difficult to prove," said David Levi, a former U.S. attorney in Sacramento who is now a federal judge. "I felt that these would be very articulate defendants. These are very intelligent people. They are winning people, persuasive people, and they're used to dealing with controversy and to speaking in public."

One by one they fell, however.

The casualty list included three once-powerful Democratic state senators--Joseph Montoya, Paul Carpenter and Alan Robbins--as well as a former Assembly Republican leader, Patrick Nolan of Glendale.

The investigation also netted former California Coastal Commissioner Mark Nathanson, former Sacramento lobbyist

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Clayton Jackson, and former legislative aides Tyrone Netters, Darryl Freeman, and Karin Watson.

And, in a spinoff case that preceded the Capitol corruption cases, prosecutors secured influence-peddling convictions of former Yolo Sheriff Rodney Graham and his undersheriff, Wendell Luttrull.

How Sting Was Launched

The sting operation was the brainchild of FBI agent Wedick, who began toying with the idea in 1982, when an informant recorded conversations with a legislative staffer suggesting that legislation was for sale.

With several other major cases on his plate, Wedick put off the notion until 1984, when he teamed up with then-Assistant U.S. Attorneys George O'Connell and Levi.

To help justify an undercover operation at the Capitol, they had the informant record additional conversations with the staffer and compiled a record of other alleged influence-peddling in the Legislature from public complaints and newspaper articles.

Their idea was to introduce a bogus special-interest bill on behalf of a dummy company whose representatives--undercover FBI agents--were ready to pay legislators who were willing to help them enact the legislation.

Officials at the U.S. Department of Justice and at FBI headquarters were skeptical of the proposal because it was the first time that the FBI had proposed creating legislation to catch corrupt politicians.

"The initial response was . . . 'The chances are slim we're going to approve something like this,'" said Wedick, who last month received a national FBI award for his work in the case. "This was such an intrusive kind of a step . . . for the federal government to reach into state government."

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Still, the trio managed to convince a special undercover committee of the Justice Department that the operation was warranted and, in October, 1985, they received approval for Operation Brispec--bribery-special interest.

But officials in Washington imposed some special conditions: There would be no secret tape recording of any legislators not specifically targeted, and no payments would be made without prior consent from top-level FBI officials.

That second condition led in 1986 to a frantic phone call at 3 a.m. to try to reach then-FBI Director William Webster at home to approve a \$30,000 payment demanded by one legislative staff member. Webster couldn't be reached.

"It was frustrating," said Levi. "It was like a bad joke."

The undercover operation featured a bogus FBI company called Gulf Shrimp Fisheries, which purportedly wanted to build a warehouse and packaging plant in West Sacramento to provide shrimp to restaurants throughout Northern California. The firm was pushing a bill--drafted by federal prosecutors--to create an exemption in the state's banking requirements that would enable the firm to reduce the cost of a construction loan for its proposed plant.

Prosecutors almost tipped their hand early on. O'Connell said that before agents were about to submit their copy of the bogus bill to the Legislature, he decided as an afterthought to check the stationery: When he held the paper up to the light, it revealed a Department of Justice watermark. The bill was retyped on plain paper, and it was then introduced in the Assembly.

Operating under utmost secrecy even within their own office, Levi and O'Connell occasionally would seek inspiration from slogans written on a blackboard in Levi's office. "Who dares, wins," was a favorite of O'Connell's, who, like Levi, later headed the U.S. attorney's office.

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Ironically, at the time they launched the sting, Sacramento officials were completely unaware that Nolan had pointed a finger at Assembly Speaker Willie Brown in a series of conversations with FBI agents in Los Angeles. Nolan, the Assembly Republican leader, claimed in mid-1985 that Brown directed certain Democratic lawmakers to "milk" lobbyists for campaign contributions in return for special-interest bills. Sacramento officials said they first learned of those allegations when they were reported in the Bee.

In fact, Levi said that despite widespread speculation--some fueled by Brown himself--the powerful San Francisco Democrat was never a target or a subject of the undercover investigation. But Levi would neither confirm nor deny that Brown might have been investigated in a spinoff probe.

Getting Past the Staffers

Although the FBI did not have an insider when it launched the sting in January, 1986, it did have a reliable informant: Marvin Levin, a Sacramento developer with a squeaky-clean past who was willing to strap a tape recorder to his boot and record conversations with acquaintances at the Capitol.

Pretending to be a family friend of FBI undercover agent Jack Brennan--who was posing as a sleazy Alabama businessman--Levin introduced the agent to Freeman, a former legislative staff member who had become a lobbyist.

Freeman steered the agent to Netters, an aide to Assemblywoman Gwen Moore, D-Los Angeles. Netters immediately began demanding campaign contributions in return for his assistance on the shrimp bill, while Freeman pocketed payments for arranging a loan application through a nonprofit agency he headed.

But Brennan encountered resistance from Netters when he attempted to meet personally with Moore and other legislators

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to discuss his contributions, making it nearly impossible to gather direct evidence against targets.

Brennan had a little more luck in the Senate, where he managed to tape several conversations with Paul Carpenter, to whom he had contributed \$20,000 at the direction of Shahabian, one of his top aides.

In all, more than \$100,000 worth of campaign contributions and "honorariums" were given to legislators and others by undercover FBI agents during the operation.

However, some in the U.S. attorney's office thought the case against Carpenter could not be won without stronger evidence that Shahabian was soliciting the contributions at Carpenter's behest. Even after Shahabian agreed to cooperate and testify against his former boss, one key prosecutor thought that the senator could effectively refute that testimony.

That prosecutor, John Panneton, said a key break in the Carpenter case came in late 1989, when he told Carpenter's lawyers that the senator would be indicted within 10 days unless he could convince prosecutors otherwise.

"There was a degree of puffing in that statement," Panneton said, adding that Carpenter might not have been indicted if he hadn't asked for a meeting with the U.S. attorney and tried to explain away his conduct with claims that he was doing his own investigation.

"For the next 3 1/2 hours, we had a prosecutors' delight," Panneton said. "For the first time, he [Carpenter] laid out his knowledge that he knew what John Shahabian was doing and that was a tremendous hole in the case."

Back in 1987, however, the case against Carpenter had been tenuous, and there had been no case against Moore. Without indictments against elected officials, the investigation might have been seen as another disappointing effort by the FBI,

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which had flubbed two Capitol corruption investigations in the 1970s.

So a decision was made to try to extend the undercover operation.

Given that the sting bill had been vetoed by then-Governor George Deukmejian at the request of the FBI, federal officials needed a new bill, a new scenario, and a new entree into the Legislature.

Enter John Shahabian.

Even though he went on to gather crucial taped evidence and testify against some of the biggest targets of the probe, Shahabian caused fits for federal authorities along the way

Months after agreeing to cooperate, he hired a lawyer and successfully demanded full immunity from prosecution despite being told that no deals could be made until after he completed his work as an informant. When the cases in which he was involved went to trial, he waited until the last minute to review transcripts on which he would be called to testify.

And last year, he wrote a letter to prosecutors, which became public, accusing the FBI of "unethical police methods" in persuading him to become an informant. Federal authorities denied those allegations but were afraid to call Shahabian as a witness in the last corruption case that went to trial.

"There was a constant tension between John and the FBI," said Panneton, who is now in private practice. "He threatened to walk out at least once. He always had the sense that he was betraying his friends at the Legislature."

All-night Raid at Capitol

One of Shahabian's most important contributions was introducing an undercover FBI agent to Karin Watson, a key aide to Nolan who later admitted to investigators that her role

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was to identify legislation that could be used to solicit campaign contributions from special interests.

That, in turn, led to separate videotaped meetings between FBI agent George Murray--posing as Georgia businessman George Miller--and Nolan and Hill at the Hyatt Regency Sacramento, where money changed hands.

On August 24, 1988, after Deukmejian had vetoed a second shrimp bill, the FBI decided to confront Watson with evidence of extortion on her part and see if she would cooperate and gather further evidence against Nolan and Hill.

Wedick interviewed Watson for nearly six hours that day, but she denied any knowledge of a money-for-votes scheme.

"She lied her way all the way through it," Wedick said. "She never told the truth, so I could never ask her to wear a wire."

Still, Watson said she would cooperate with investigators and consented to have her Capitol office searched.

Meanwhile, a team of more than 30 FBI agents was mobilized at the Hyatt with search warrants for several other Capitol offices. Shortly before 10 p.m., they descended on the Capitol and began their all-night raid.

In Watson's office, investigators found documents that suggested she and Nolan were engaged in influence-peddling activities other than on the shrimp bill. "Smoking guns," Wedick called them, and they turned out to be the only documents from the search that were used in any of the five trials.

Because the original search warrant pertained only to documents associated with the shrimp bill, Wedick had to propose another search warrant at about 2 a.m., and awaken a federal magistrate for approval.

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The search did not end until about 5 a.m., and the next day, news of the Capitol sting was splashed across newspapers and television screens.

After the investigation became public, federal prosecutors hoped that it would prompt lobbyists to come forward with other incidents of alleged bribery involving targeted lawmakers. But those hopes were dashed.

"It was very frustrating pulling together the non-sting aspects of the case," Levi said. "The lobbying community was very hard. They did not want to cut their own throats or hurt their friends Even when they were prepared to testify, they were anxious to make it appear that they were not cooperating, that they were under subpoena and were not helping the government."

As it turned out, the investigation would focus three years later on one of the most prominent lobbyists in the Capitol--Clayton Jackson. The towering, cigar-chomping Jackson was implicated largely by Robbins, who agreed in 1991 to wear a hidden tape recorder to gather evidence of a \$250,000 bribe offer regarding workers' compensation insurance legislation.

In 1993, prosecutors confronted Jackson with the tapes that Robbins had made, and tried to get him to cooperate with them in their expanding probe. But Jackson, who had hired the same defense lawyer who represented Shahabian, refused to enter into a plea agreement, and he went to trial.

"We tried real hard to twist Clay Jackson, to get him to cooperate," said O'Connell, who is now in private practice. "And there were no limitations on the level of cooperation."

Jackson eventually was convicted of racketeering, among other crimes, and is serving a 6 1/2-year prison sentence.

Wedick also said the investigation was thwarted by the destruction of records at the Capitol by Nolan and Robbins.

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"Alan (Robbins) had his secretary destroy records: He knew it and I knew it," Wedick said. "He also had his secretary alter records."

Although Robbins was immediately implicated by Shahabian on the shrimp bill, it was his other activities that led to his downfall--seeking bribes on other legislation and his outside business dealings. When investigators intensified their investigation of him, he started to panic.

Prosecutor Vincent said that even though the 1990 search of Robbins' Encino home turned up no valuable evidence, it was "the major impetus for Robbins to start negotiating a (plea bargain)."

Today, the key players in the sting operation say that the string of successful cases has changed some behavior at the Capitol, and that lawmakers are less likely to link campaign contributions with their official actions--at least overtly. But they believe that money will continue to play a role in the legislative process.

"I have the impression that people are more careful, more aware," said O'Connell. "I'm not sure there isn't some winking and nodding going on. But there's less criminal corruption now."

"I think the undercover project made some legislative and interest groups more sensitive to the fact that campaign contributions shouldn't be dangled as a reward or withheld as a threat," Levi said. "One undercover project doesn't eradicate a type of crime, but it acts as a deterrent."

Said Wedick, "We definitely corralled some of the biggest players down there, but I don't think we got them all."

Bee staff writer Denny Walsh also contributed to this report.

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**The Fresno Bee
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**THE VALLEY IN REVIEW 1998
Big Names Surface in Operation Rezone Case
The Year Ahead Will Be Filled with
Lots of Court Time for the Feds
and the Defendants, Including a Former Assemblyman
Jerry Bier, The Fresno Bee**

The headline was dramatic: "Bonadelle, Lung, Logan indicted in Rezone probe."

The federal government's public corruption investigation, dubbed Operation Rezone, had in early 1998 swept up one of the most powerful behind-the-scenes political figures in Fresno history, along with a former Fresno City Council member and one of the most successful developer-lobbyists in the city.

They were only three names in a growing list of local politicians and development industry officials indicted in the investigation, but they were big names.

Fresno developer John Bonadelle, former council member Bob Lung, and lobbyist Jim Logan had been dominant figures on the local political scene.

Their criminal indictment highlighted 1998, even though another followed, this time naming former Fresno City Council Member Brian Setencich, who also went on to serve a brief term as state Assembly speaker.

Bonadelle and Logan have denied the charges and face an April trial date. Lung pleaded guilty and is cooperating with government investigators. Setencich has called the charges against him "ludicrous" and said he, too, will go to trial.

Now, with Operation Rezone nearing the end of its fifth year, some observers question whether FBI and Internal Revenue Service agents and federal prosecutors will continue

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to pursue the investigation with the same resolve as when it began in early 1994.

Was the Bonadelle case the culmination of the investigation?

Was Bonadelle, whose influence has been felt in local politics and development for nearly 40 years, the target that most satisfied investigators?

Federal authorities insist the Rezone investigations are not over.

"There are still leads and allegations, and investigations are continuing," said U.S. Attorney Paul L. Seave.

James Maddock, FBI special agent in charge in the Eastern District of California, agreed: "Public corruption is our No. 1 priority in the Eastern District, and that's certainly true for Rezone. As long as we have indications that there is corruption, we are going to pursue it and dedicate the resources to it."

Neither Seave nor Maddock would discuss specific cases or comment on the details of ongoing investigations; however, both men are known for targeting white-collar criminal corruption cases.

While there has been no official pronouncement, it has been reported that federal agents raided the office of developer R. J. Hill and the home of developer Bud Long in Fresno, as well as subpoenaed payroll records of former Fresno City Manager Michael Bierman.

"I can't really give you any specifics except to tell you we do have a number of anti-corruption initiatives and investigations underway and I think if those reach the prosecutive stage, people will see our commitment to that," Maddock said.

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Thus far, the Fresno investigation, with 11 convictions, still trails the federal government's nine-year Capitol corruption cases in the late 1980s and early 1990s that resulted in convictions of 14 lawmakers, legislative aides, lobbyists, and other public figures.

Both Operation Rezone and the Capitol cases were led by FBI special agent James Wedick Jr., an investigator who has been honored nationally for his work on white-collar crime investigations.

Assistant U.S. Attorney John K. Vincent, the lead prosecutor in Operation Rezone, also was involved in the Capitol corruption prosecutions, as was Howard Moline, an Internal Revenue Service special agent who continues to work on Operation Rezone.

1998 also produced the longest sentence thus far in Operation rezone. Former Fresno City Council Member Robert C. Smith was given an eight-year term following his jury conviction on extortion, racketeering, and other charges.

Smith went to trial after backing out of a plea agreement in which prosecutors were recommending that he spend no more than a year in a halfway house in return for his cooperation in Operation Rezone.

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Los Angeles Times

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Thursday, December 8, 1994

South Bay; PART-J; Zones Desk

**Kuykendall Blends Pragmatism, Ideology: Legislator
Says Accepting Tobacco Firm's \$125,000 Contribution
Helped Him Beat Incumbent, and Vows It Won't Ease
His Opposition to Smoking**

TED JOHNSON

TIMES STAFF WRITER

If the state Assembly takes up campaign finance reform again, Assemblyman Steven T. Kuykendall (R-Rancho Palos Verdes) admits that he might be singled out.

"I may have taken what is the largest single contribution to an individual Assembly candidate, except for maybe Willie Brown," said Kuykendall, who was sworn in Monday as the assemblyman in the 54th District, which includes the Palos Verdes Peninsula, San Pedro and Long Beach. Campaign reform would limit the size of contributions to state Assembly and Senate campaigns.

In the waning days of the campaign, Kuykendall accepted a \$125,000 check from tobacco giant Philip Morris even though he is on record as supporting anti-smoking legislation.

It might look like a contradiction. But this is how the political system works, Kuykendall says, a sentiment echoed by former colleagues on the Rancho Palos Verdes City Council and even a few of his former opponents.

A more polished politician might be coy about it, but Kuykendall freely admits that accepting the money was a pragmatic move that may have helped him defeat incumbent Betty Karnette by 597 votes.

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Now, Kuykendall, an ex-Marine and mortgage banker, is facing threats of a recall launched by Sacramento Democrats. The state party has already filed a complaint over the contribution with the state Fair Political Practices Commission.

But so far, there's been little protest beyond Sacramento Democrats. Kuykendall and his supporters dismiss the complaint as frivolous and doubt that a recall will go anywhere.

"It's something that he's always going to have to deal with. But I'd rather accept the check and be the winner with controversy than be the loser," said Republican consultant Tom Shortridge, president of Bear Republic Political Services in Redondo Beach.

Even anti-smoking groups say they are confident Kuykendall won't be beholden to the tobacco company.

"I expect we are going to be working with him," said Paul Knepprath spokesman for the American Lung Assn. in Sacramento.

This is not the first time that pragmatism and ideology have clashed for Kuykendall. Elected to the Rancho Palos Verdes City Council as a "read-my-lips, no-new-taxes" conservative, he soon found himself justifying tax increases as a way to resolve the city's fiscal crisis.

He voted for a utility tax, which the council passed last year, and supported a parcel tax, which narrowly lost when it was put on the ballot in 1992. With the city in need of new revenue, Kuykendall even suggested a referendum to ask residents if they wanted to hand control of the city over to the county.

"It's not a question of ideology, but whether a locally controlled city government can survive or not," he said at the time. "It's that simple."

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The Draconian proposal went nowhere, but did get people talking.

"As a businessman, he had a way of saying 'Look at this problem or we'll be in bankruptcy,'" former Councilwoman Jacki Bacharach said.

Affable and frank, Kuykendall seldom displays a hard-nosed attitude people have come to expect from former Marines. He served two tours of duty in Vietnam, including a 1972 stint in which he was among the troops stopping the North Vietnamese Easter offensive. (One of his three children, daughter Kerry, followed him into the military as an ensign in the U.S. Navy. She is training to be a fighter pilot.)

After he retired from the military, Kuykendall worked at several banks and then helped start Lockheed Mortgage Corp., a subsidiary of Lockheed Corp. He is now a principal in the David Buxton Financial Corp. in Torrance and works as a real estate consultant and lobbyist, including work for the Palos Verdes Medical Center and Peninsula Medical Plaza.

But in recent years, his business affairs have taken a back seat to politics. In fact, during the primary, opponent Jeffrey Earle tried to cast him as a career politician. Kuykendall made an unsuccessful run for the school board in 1987 and then the City Council in 1989 before he won a council seat in 1991. And about a year and a half after his council election, he was in the race for the state Assembly.

"Some people said he was running too soon," said former Rancho Palos Verdes Councilman Bob Ryan. "But Steve's been (active) in representative politics since he was knee-high." Although opponents have tried to use his change of view on taxes and his political aspirations against him, their attacks haven't seemed to work. One reason, colleagues on the council say, is that he has been more of a peacekeeper than a combatant during council meetings.

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"He didn't bring too much of his personal agenda to the table," Bacharach said. "In fairness to Steve, I thought it was really good of him to (switch on taxes). I thought it was wrong of him to run on a platform of no new taxes. But he became a problem solver."

Even Earle, Kuykendall's primary opponent, backed him in the general election. Kuykendall sent a last-minute mailer during the primary, noting that Earle lived with his mother and suggesting that he didn't have enough experience to succeed in Sacramento. Earle explained that he moved in to help his mother when she had heart surgery.

"I wasn't really thrilled by (the mailers)," Earle said. "But these were the typical last-minute hit pieces that come out in a campaign. I didn't harbor any longstanding resentment for the stuff that came out."

And Kuykendall's supporters say that voters have little if any resentment over the Philip Morris contribution. Kuykendall notes that the tobacco giant has a number of subsidiaries, including real estate and food products.

"That company has got a lot more at stake than whether or not they sell cigarettes," Kuykendall said.

And ironically, it could be the Philip Morris contribution that ensures that he backs anti-smoking legislation while in Sacramento. Otherwise, opponents could gain even more fodder for a recall.

"He's not going to be dumb enough to vote tobacco," said Shortridge, the Republican consultant. "I don't think he owes them anything."

Steven Kuykendall says donation might look like a contradiction but it's how politics works.

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Los Angeles Times
Copyright 1996 / The Times Mirror Company
Tuesday, October 29, 1996
Metro Desk
In Legislative Races, Tobacco
Is a Hotter Issue Than Ever:
Several Candidates Get Burned by Foes
for Taking the Industry's Donations. Some Who
Accepted Gifts in the Past Are Now Shunning Them
DAN MORAIN
STAFF WRITER

SACRAMENTO -- Tobacco is being used as an issue in California legislative campaigns like never before, with several candidates pummeling their foes for taking tobacco money and casting pro-tobacco votes.

Some politicians who took tobacco donations in the past are on the defensive, and some are shunning such contributions now. "What do you call a nurse who takes money from the tobacco companies?" one mailer asks. Open up the brochure, and there's a drawing of Joe Camel in a nurse's uniform. "Tricia Hunter. The Tobacco Nurse."

Democrat Howard Wayne is sending this attack as part of his campaign against Republican Hunter for a San Diego-area Assembly seat. When she was in the Assembly in the 1980s and early 1990s, Hunter took roughly \$6,500 from tobacco concerns.

That sum is paltry by California standards. But as she tries to reclaim a seat in the lower house, Hunter says, she won't be taking a dime more.

"Absolutely not worth the hit," she says.

Tobacco long has been an issue in California, the first state to approve a tobacco tax for anti-cigarette advertising. That was in 1988. California also led the nation in imposing

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smoking bans, and overwhelmingly rejected a tobacco industry-sponsored initiative in 1994.

But candidates for California state office, and some for congressional seats, are using the issue with greater frequency in this campaign.

Pollsters, consultants and politicians cite several reasons: President Clinton has placed tobacco at the fore nationally, calling for increased regulation. At the same time, more state and local governments have sued tobacco firms to recoup the cost of treating tobacco-related illness.

Experts say that a candidate's acceptance of tobacco money, or an elected official's votes for tobacco bills, probably won't be enough to sway an election. But when tobacco is raised as part of a cluster of issues, voters may begin to question a politician's independence.

Indeed, some candidates are telling voters that they accept no money from tobacco, the gun lobby or the oil industry.

"It creates a general atmosphere that you're beholden to special interests," said state Senate President Pro Tem Bill Lockyer, who is overseeing Democratic campaigns for the upper house.

So far, tobacco is a significant issue in four of the hottest five races for the state Senate. For the most part, Democrats are using the issue against Republicans. But some Republicans are assailing Democrats who take tobacco money.

In a coastal Senate race, Assemblyman Bruce McPherson (R-Santa Cruz) is preparing to send mailers citing tobacco donations accepted by his opponent, former Assemblyman Rusty Areias of Los Banos.

"It is part of a whole package," said McPherson, citing his refusal to take oil industry money.

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All this is not to say that tobacco firms aren't major players in the election. Philip Morris, the world's largest cigarette firm, poured more than \$300,000 into California campaigns in the first half of the year.

The New York conglomerate has given \$217,000 to legislative leaders, including \$55,000 each to Lockyer and Senate Republican Leader Rob Hurtt of Garden Grove.

"Every campaign is under-funded," Lockyer said, explaining why he takes tobacco money. "I recognize that it sets me up for some future political hit. But it's my job as the financier of the campaigns, as the Democratic leader of the Senate, to try to maximize the amount of resources in campaigns."

As legislative leaders go, Lockyer takes relatively small sums of tobacco money. Republican Speaker Curt Pringle of Garden Grove, by contrast, has accepted more than \$102,000 from the tobacco industry this year.

Assembly Democratic Leader Richard Katz of Sylmar has not taken tobacco money on behalf of Democrats running for the lower house. However, other Assembly Democrats have taken tobacco money, including at least one potential successor to Katz, Assemblyman Cruz Bustamante of Fresno.

Even more cigarette money undoubtedly will flow into state races during the final week of the campaign, if 1994 is any indication.

On the day before the 1994 election, Philip Morris shipped \$125,000 to one Assembly candidate, Republican Steve Kuykendall of Rancho Palos Verdes, giving Kuykendall the money he needed to pay for political mailers against his incumbent opponent. Kuykendall won the Assembly seat.

This year, Kuykendall's foe, Democrat Gerrie Schipske, is running a campaign built almost exclusively around the \$125,000 donation Kuykendall took two years ago. Among her

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campaign props, Schipske hands out pill bottles, filled with "Tobacco Cash Withdrawal Pills." The pills are jellybeans.

"WARNING," the pill bottle label says. "Taking \$125,000 from Philip Morris during 1994 campaign without telling voters will result in loss of your Assembly seat in 1996."

"Why don't you campaign on something the public is interested in?" Kuykendall says to his foe. He points to what he sees as the main issues in the Long Beach area district: jobs, crime and education, not tobacco.

"It has caused a lot of heartburn, I must say that," Kuykendall said of the donation. He added that he has no plans to take more tobacco money this year. "There is no need to go back. Just the aggravation it causes, why put up with it?"

Among the other races in which the tobacco issue is a factor;

In the campaign for a state Senate seat in the Long Beach area, Democrat Betty Karnett, who was unseated by Kuykendall in 1994, is devoting much of her mail campaign to tobacco donations accepted by her opponent, Assemblyman Phil Hawkins (R-Bellflower), and pro-tobacco votes Hawkins has made.

Democrat Adam Schiff, running for a Pasadena-area Senate seat, cites tobacco company money accepted by his opponent, Republican Assemblywoman Paula Boland of Granada Hills. Boland responded by accusing Schiff of hypocrisy because he has taken money from Democratic leaders who have taken tobacco money.

The tone is getting personal in the hard-fought Senate campaign between Assemblyman Richard Rainey (R-Walnut Creek) and Democrat Jeff Smith, a physician and Contra Costa County supervisor.

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"The only way he is going to be able to win is to tear down my reputation," Rainey said in an interview.

Smith opened with a volley of mailers, including one signed by a lung cancer patient Smith had treated, citing Rainey's acceptance of \$3,750 in tobacco money, and votes against anti-tobacco bills.

Rainey responded with a letter signed by his daughter, Gina, pointing out that her mother, Rainey's first wife, died of breast cancer in 1986. Accusing Smith of an especially low blow, the letter declared, "No election is worth winning if it means sacrificing common decency."

Given the anti-tobacco messages in several campaigns, the Legislature that returns to Sacramento could be willing to take steps to further limit cigarettes, some observers say. At a minimum, lawmakers who have made an issue of tobacco will find it hard to vote for pro-tobacco legislation.

"It's a clear message to tobacco companies: I'm not one of their votes in Sacramento," McPherson said. "If they want a vote, go someplace else."

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Los Angeles Times
Copyright 1998 / The Times Mirror Company
Friday, July 3, 1998

Metro Desk

**Casino Campaign Donations Questioned: Legislature's
Legal Advisor Says Lawmakers Could Face Criminal
Sanctions if They Accept Contributions from Indian
Gambling Operations Deemed To Be Illegal**
DAN MORAIN; DAVE LESHER
TIMES STAFF WRITERS

SACRAMENTO -- Fueling an already heated debate over gambling, the Legislature's legal advisor has issued an opinion warning that lawmakers could face federal criminal sanctions if they accept campaign donations from Indian gambling operations deemed to be illegal.

The opinion, obtained Thursday, comes as Native Americans battling to operate casinos on reservations emerge as a major political force in the capital. Among the largest campaign donors in California, they have given Democrats and Republicans more than \$1 million so far this year.

Opponents of the expansion of gambling on reservations immediately seized on the opinion, saying lawmakers who support the tribes' position should immediately refrain from taking any additional money from them.

"I wouldn't take it," Senator Quentin Kopp, a San Francisco independent, said, adding that he intends to introduce legislation next week to prohibit contributions from such sources. "I'd advise anyone not to accept such contributions in the future."

Several state legislators and candidates for the Senate and Assembly have taken five-figure donations from various tribes. But the implications of the opinion by the legislative counsel extend to the races for governor, attorney general, and other

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statewide offices; in those campaigns, some candidates have accepted hundreds of thousands of dollars.

"Nothing but a legal opinion," said Senator Richard Polanco (D-Los Angeles), one of the main proponents of the tribes' position and a large recipient of their donations. "[The casinos] are functioning today. If they were out of compliance, they would be shut down. They have not been shut down. The courts have not ruled."

The legislative counsel's opinion acknowledges that many aspects of the issue are not settled.

Federal prosecutors across the state have filed civil suits seeking to shut down the gambling operations. However, courts have not held conclusively that the operations violate state and federal law.

Still, the opinion raises the possibility that lawmakers who take money from illegal gambling operations could be forced to return the money, whether or not they know the operations are illegal. If they know that the operations violate the law, candidates who take donations could face prison time, the opinion stated.

Citing federal laws against money laundering and racketeering, the opinion says that "money that is generated at an Indian casino from gambling activities that are illegal under state or federal law is potentially subject to seizure by federal authorities."

The opinion also says that "any person who knows that the underlying activity is illegal and nonetheless participates in a financial transaction involving that money in excess of \$10,000 may also violate [federal criminal law], and consequently be punished by up to 10 years in prison."

Legislative counsel opinions generally do not become public. They are intended to be confidential, between

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lawmakers and their in-house attorneys. This document was leaked anonymously to the Times and other publications.

Underscoring the intense lobbying and the high stakes involved in the fight over gambling, the opinion was dated June 26, indicating that it was circulated among legislators as they prepared to vote on legislation to ratify a gambling compact negotiated by Governor Pete Wilson and the Pala Indians, a pact that was denounced by several other tribes that want greater rights over the future of their gambling enterprises.

The major gambling tribes won an initial victory this week when the pact was voted down in an Assembly committee, although the issue is expected to be voted on again this summer.

Nevada gambling interests are among the main opponents of the California gambling tribes, mounting a major lobbying effort in Sacramento. Nevada casinos want to limit the expansion of gambling in California to protect a major part of their customer base: gamblers from this state.

In the gubernatorial campaign, Lieutenant Governor Gray Davis, the Democratic nominee, has accepted more than \$125,000 from Indian gambling interests, while Republican Attorney General Dan Lungren, the Republican nominee, is not accepting the money.

Garry South, Davis' campaign manager, said: "Let's not lose sight of one fact here--this alleged illegal gambling activity is only that because Pete Wilson has refused to negotiate and bargain in good faith with the Indians. This is playing with semantics and tricky definitions here."

Lungren's campaign issued no comment on the opinion.

In the race for state Attorney General, Dave Stirling, the Republican nominee and Lungren's chief deputy, took \$300,000 from Indian gambling interests during the primary.

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The Democratic nominee, Senator Bill Lockyer, has taken only minimal sums in the past, and did not accept any such contributions during the primary.

Lockyer said the opinion raises "sufficient questions about the priority of relying on this funding source to cause concern."

However, Stirling's campaign manager, Sal Russo, dismissed the opinion: "This is all about the Nevada casinos protecting their economic stake in gambling, to the detriment of Native Americans in California."

In a related development Thursday, a memo by attorney Joseph Remcho, an expert in initiative law, was leaked. It said that an initiative pushed by several tribes to allow them greater rights over gambling is probably illegal.

The memo, obtained from one of the competing factions involved in the gambling fight, says the initiative is improper because it seeks to authorize gambling activities prohibited by the state constitution. The attorney said such a change would require a constitutional amendment, not an initiative.

"To the extent that the Constitution prohibits a type of gaming, the state cannot authorize such gaming by statute or compact alone, but only by amending the Constitution," the memo says. "The initiative does not include a constitutional amendment. Thus, any gaming [activities] authorized by the initiative . . . are subject to these constitutional restrictions."

George Forman, an attorney representing several of the tribes, dismissed Remcho's opinion: "He's wrong He's real good in some stuff, but not so good in others."

Times staff writer Max Vanzi contributed to this report.

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Los Angeles Times
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Wednesday, October 21, 1998

Metro Desk

Labor, Trial Lawyers Pour Millions Into Davis' Coffers
Funds: A Third of Gubernatorial Candidate's Money
Comes from Two Groups That Usually Back Democrats

VIRGINIA ELLIS
TIMES STAFF WRITER

POLITICAL CURRENCY. The Candidates and Their Finances. One in an occasional series

SACRAMENTO -- In August, Democratic gubernatorial hopeful Gray Davis sat before health care providers and assured them that his biggest campaign dollars had not come from unions and trial lawyers.

"If you want to talk cold turkey about who was there when you needed them, they were not there," Davis told a dozen potential contributors from a coalition that often locks horns with organized labor and malpractice lawyers. "Unions were preoccupied . . . and a lot of trial lawyers thought I couldn't make it--too dull, too boring."

It would have been shocking enough that unions and trial lawyers, two of the deepest pockets for Democratic candidates, had shunned the party's front-runner during the primary, just when he needed them most.

But records show that these two groups had contributed prodigiously to Davis, pouring millions of dollars into his primary and general election campaign. By Sept. 30, they had pumped more than \$7 million into his candidacy, providing more than a third of his campaign financing.

In the meeting with health care leaders, Davis, who has long enjoyed the largess of organized labor and trial lawyers, was seeking to allay fears that the two interest groups would

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wield inordinate influence if he were elected governor. His campaign manager would later say he really meant that neither group had contributed substantially in the early days of the primary campaign, when his candidacy was on the ropes.

Even so, the episode provides a rare glimpse into the private fund-raising efforts of a candidate eagerly seeking to broaden his political and financial base and raise the millions needed to compete in the nation's most expensive gubernatorial election.

Davis and his rival, Republican state Atty. Gen. Dan Lungren, are expected to spend more than \$45 million between them. Davis is leading in the financial competition, having raised \$21 million to Lungren's \$17 million. Besides labor and trial lawyers, the entertainment industry has opened its wallet to the tune of \$2 million, financial services providers have donated nearly \$1.5 million, real estate interests have given more than \$1 million and Indian tribes involved in gaming have contributed more than \$300,000.

But the backbone of Davis' campaign came as it has in past elections from traditional Democratic donors--organized labor and law firms that represent plaintiffs in civil actions.

The outpouring eclipsed anything labor and the trial lawyers had contributed to gubernatorial candidates in recent elections, outstripping donations they made to the campaigns of Kathleen Brown, the Democratic nominee in 1994, or Dianne Feinstein, the nominee in 1990.

Support Is Both Blessing, Curse

For Davis, the backing has been both a blessing and a curse. While providing a strong financial base, it also impeded his ability to raise money from groups that have vastly different agendas from unions or trial lawyers.

So Davis was careful to downplay their involvement in his campaign when he met Aug. 28 in San Francisco with a dozen

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representatives of Californians Allied for Patient Protection, a coalition of health care providers that control thousands of dollars in campaign contributions.

In the past, the member groups had mostly given to candidates who shared their views on medical malpractice issues, which often are at odds with trial lawyers who represent victims of injuries, defective products and physician negligence.

To their surprise, Davis told the group that his position on malpractice issues was actually in sync with theirs--a comment that prompted one member to quickly ask how he could remain in their camp when he traditionally received strong financial support from trial lawyers and unions.

"Do I feel allegiance?" the candidate said in tape-recorded remarks that were later transcribed. "Yes, but not to the groups that the newspapers say I feel allegiance to, 'cause they were not there for me for a variety of reasons."

"Rich Republicans," he said, got him through the primary, a reference his campaign manager later said was to a handful of contributors such as A. Jerrold Perenchio, who is majority owner of the Spanish language network Univision.

California Medical Assn. Executive Vice President Jack Lewin, who attended the meeting, said the group found Davis' message reassuring.

"Before meeting with Mr. Davis, [the coalition] was clearly predisposed toward Lungren," Lewin said. "After that meeting, there was really openness toward both candidates."

The latest campaign reports show that the coalition's member groups have since given Davis more than \$40,000.

Davis declined a request for an interview. But his campaign manager, Garry South, said the candidate was only lamenting the extent of labor and trial lawyer support during

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the first three months of the year, when he was being outspent by his millionaire rivals in the primary race, Al Checchi and Jane Harman.

In that time frame, South said, most of the contributions and fund-raising efforts came from individuals, including some Republicans. And he said special interests such as labor and trial lawyers did not start giving large amounts until April, when Davis began moving up in the polls.

"A candidate remembers who was there when the going was tough a hell of a lot more than they do who was piling money on at the end when it looked like you were a sure winner," South said.

Davis' statement did not seem to dampen the support of labor leaders contacted by the Times.

"Frankly, I seriously doubt he had us in mind when he made those statements," said Perry Kenny, president of the California State Employees Assn., which has donated \$355,000. "We have been with Gray since the beginning of the primary. We believe he will be an excellent governor."

Labor and trial lawyers see Davis' election as an opportunity to regain access to the governor's office, reverse the anti-union policies of Gov. Pete Wilson and ensure that a Democratic chief executive oversees the once-in-a-decade redrawing of legislative and congressional boundaries.

"This a pivotal election," said Frank Russo, president of the California Applicants Attorneys Assn., a coalition of lawyers who handle workers' compensation cases. "We've suffered under 16 long years of Republican governors. Our members are overwhelmingly supporting Gray Davis."

For labor, the election comes after a bruising eight years under Wilson, who was able to eliminate the requirement that workers be paid overtime for more than an eight-hour day, stall

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labor's legislative agenda and force it to spend millions to defeat hostile initiatives.

Earlier this year Wilson backed and campaigned for Proposition 226, an initiative that would have required written permission from each worker before union dues could be used for political purposes. Labor spent nearly \$24 million to defeat the proposal.

"In a sense, it's payback time for labor," said Charles Price, a political science professor at Cal State Chico. "Pete Wilson went out of his way to throw a monkey wrench in the labor movement."

Energized by their defeat of Proposition 226, labor groups representing teachers and office workers, police and firefighters, the building trades and government workers have pumped more than \$5.5 million into Davis' campaign since January.

"What we're after is a cessation of the labor wars that Wilson has waged against us for eight years," said Jim Lewis of the State Building & Construction Trades Council of California. . . . "With Gray Davis, we know we won't have to play defense all the time both in the Legislature and in the court."

Nearly half of labor's contributions came from government employee groups who have battled Wilson over raises, raids on their pension funds and union contracts.

Agenda Blocked by Republican Governors

In the same period, records show, trial lawyers gave nearly \$2 million to Davis' campaign, with big law firms--such as Robinson, Calcagnie and Robinson of Orange County; Greene, Broillet, Taylor, Wheeler and Panish of Santa Monica; and Girardi and Keese of Los Angeles--donating at least \$100,000 each. San Diego trial attorney William Lerach contributed \$120,000 as an individual.

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Mark Robinson, incoming president of the Consumer Attorneys of California, insisted that there was no coordinated effort to support Davis. But he said that trial lawyers traditionally support Democrats and that Davis shares their views on environmental, consumer and education issues.

"I can just speak for myself," he said. "I've been very frustrated, and I feel we need new leadership."

The trial lawyers' legislative agenda, like labor's, has been blocked by Republican governors. Davis supports some of their positions but he opposes their proposed increase in the \$250,000 limit on pain and suffering damages in medical malpractice cases.

That demonstrates, South said, that Davis' critics are wrong when they say trial lawyers and labor will have the inside track in his administration. He insisted that Davis only offers a sympathetic ear, not an automatic rubber stamp for what the two groups want.

"They know they aren't going to get everything they want out of Gray, but they feel a lot more comfortable with him than they do with Dan Lungren," South said.

The lieutenant governor already has expressed support for restoring the eight-hour workday, promised not to tinker with the prevailing wage, vowed to reach a contract agreement with state workers and made it clear he would not sponsor anti-union ballot initiatives.

Before the primary, Davis received \$319,000 in political contributions from California Indian tribes that run casinos, then abruptly in July stopped accepting such donations. His moratorium followed the indictment of two officials of the Cabazon Band of Mission Indians. The tribe contributed more than \$115,000 to Davis' campaign, but the charges against the officials--laundering illegal contributions--involved six other Democratic candidates.

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Davis has openly courted Native American tribes, writing officials in April to assure them that he did not support the expansion of card rooms--an Indian gaming competitor.

South said Davis distanced himself from Indian interests not only because of the indictments but also because of a host of unresolved gambling issues.

Before the moratorium, the Twenty-Nine Palms Band of Mission Indians donated \$101,100 to Davis. Gene Gambale, general council for the group, said Davis' moratorium has not reduced tribal support because he is still viewed as more willing than Wilson to "have direct discussions" with the tribes about gambling issues.

South said that, although Davis opposes the expansion of gambling in California, "he is not for rolling the clock back and going onto the reservations and raiding them and shutting down their gambling operations."

One of Davis' other major blocs of contributors is the entertainment industry, including large contributions from Hollywood figures such as producer Jeffrey Katzenberg and Haim Saban, producer of the Mighty Morphin Power Rangers.

South said most of their support is philosophical. "Once you get past Charlton Heston and Tom Selleck," he said, "the number of Republicans in Hollywood is sparse."

JUN 7 1999

In The
Supreme Court of the United States CLERK

JEREMIAH W. (JAY) NIXON, Attorney General of Missouri;
RICHARD ADAMS, PATRICIA FLOOD,
ROBERT GARDNER, DONALD GANN,
MICHAEL GREENWELL and ELAINE SPIELBUSCH,
members of the Missouri Ethics Commission;
ROBERT P. MCCULLOCH,
St. Louis County Prosecuting Attorney,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC;
ZEV DAVID FREDMAND; JOAN BRAY,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF NATIONAL RIGHT TO LIFE PAC STATE FUND,
NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND
and STATE EMPLOYEE RIGHTS CAMPAIGN COMMITTEE AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS SHRINK
MISSOURI GOVERNMENT PAC
and ZEV DAVID FREDMAND
SUGGESTING AFFIRMANCE

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether low limits on contributions to candidates (such as Missouri's \$1,075 per election limit on contributions to candidates for statewide offices) are unconstitutional because they are not narrowly tailored to avoid infringing the free association rights of the majority of donors whose contributions do not implicate the governmental interests in stemming corruption or its appearance.

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INTEREST OF THE AMICI CURIAE

Amici curiae, which are donors in political campaigns at the federal, state and local levels, submit this brief in order to emphasize the interest of campaign contributors in exercising their First Amendment right to free association.¹

Amicus National Right to Life Political Action Committee State Fund (NRLPACSF) is a political action committee, connected with National Right to Life Committee, Inc., which makes contributions to campaigns in various states throughout the country. In addition to contributions, it engages in other kinds of political activity such as independent expenditures. Direct contributions to candidates, however, constitute an important part of NRLPACSF's political activity. NRLPACSF attempts to affect public policy by making contributions to candidates who share its views on pro-life issues in the hope that such candidates will be elected and institute pro-life policies in government. NRLPACSF does not make its contributions in an attempt to influence specific legislative votes. It contributes only to candidates who share its commitment to the pro-life position on issues. NRLPACSF determines whether candidates agree with its positions by means of questionnaires (reproduced in the Appendix hereto at 1), through personal contacts with candidates and through various other means. In the past, NRLPACSF has contributed to certain candidates the maximum amount allowable under applicable law. In the last three election

¹ Consents from the parties to filing this brief have been filed with the Clerk of this Court. *Amici* support the position of the respondents Shrink Missouri Government PAC and Zev David Fredman. Counsel for a party did not author this brief in whole or in part. The James Madison Center for Free Speech made a monetary contribution to the preparation and submission of this brief. No other person or entity, except for the *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

cycles combined, NRLPACSF contributed to eleven candidates a total of \$55,800.

Amicus National Rifle Association-Political Victory Fund (NRA-PVF) is a separate segregated fund of the National Rifle Association (NRA). The NRA-PVF is registered with the Federal Election Commission and with numerous state political/election agencies and makes contributions to candidates for federal, state, and local office throughout the United States. These contributions are a crucial part of NRA's political activities. The NRA-PVF also makes independent expenditures in support of and in opposition to candidates. In deciding to whom contributions are made, the NRA-PVF looks to a candidate's record and expressed positions on firearms issues. For all candidates, the NRA-PVF generally sends a questionnaire on firearms issues, reviews campaign statements, and interviews the candidate and other persons knowledgeable about the candidate. For incumbents or others who have held office, the NRA-PVF considers how he or she has voted on bills and amendments, what bills or amendments he or she has introduced, and statements he or she has made during debates. The NRA-PVF contributes only to candidates who share NRA's views on firearms issues so that such candidates will be elected and support NRA's positions on those issues. The NRA-PVF does not contribute to candidates who have not demonstrated support of NRA's views on firearms issues. The NRA has frequently contributed the maximum allowed by applicable law to candidates who were particularly strong supporters and would have made larger contributions but for the law. In the last three election cycles, the NRA-PVF has contributed approximately \$4,922,475 to 869 candidates.

Amicus State Employee Rights Campaign Committee (SERCC) is a political action committee sponsored by The National Right to Work Committee (NRTWC), a non-stock corporation which is tax-exempt under 26 U.S.C. § 501(c)(4). In addition to its home state of Virginia, in the

last few election cycles, SERCC has contributed to candidates in sixteen other states. SERCC generally limits its activities to contributing to candidates for political office or to other political action committees. SERCC contributes to candidates who share the views of SERCC and NRTWC on Right to Work issues in the hope that such candidates will be elected and will institute or defend pro-Right to Work policies in government.

SERCC does not make any attempt to influence specific legislative votes. Instead, by contributing, SERCC helps elect candidates who already support Right to Work principles. SERCC does not contribute to candidates who have not demonstrated a commitment to the pro-Right to Work position on issues.

SERCC determines whether prospective candidate donees agree with the Right to Work position on issues by researching candidate positions, using the results of candidate surveys conducted by NRTWC and various Right to Work organizations (samples reproduced in the Appendix hereto at 22), and by consulting other sources of information on candidate positions, such as voting records and public statements or positions of the candidates.

In the 1994 through 1998 election cycles, SERCC contributed a total of \$68,401.78 to 106 state races. At times, SERCC contributed the maximum amount allowed under applicable law for contributions to candidates. For example, in the 1996 primaries, SERCC contributed the miserly maximum of \$100 each to twelve candidates for the Montana Senate and House of Representatives, and in the 1996 general elections, SERCC contributed another miserly maximum of \$100 each to four candidates for the Montana Senate and House of Representatives. In the 1998 primaries, SERCC again ran up against these miserly limits, being allowed to contribute only \$100 each to two candidates for the Montana legislature. SERCC would have contributed more than \$100 each to these Montana candidates, if it had not been prevented from doing so by Montana law.

SUMMARY OF THE ARGUMENT

Free association between contributors and candidates is a uniquely American institution and the primary method by which candidate speech is financed in this country. Every campaign spawns countless informal associations between and among contributors and candidates. Such associations are protected by the First Amendment because they exist to serve the interest in free and robust political speech which is the *sine qua non* of representative government. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (*Sullivan*). For the freedom to speak depends upon the freedom to join with others in speaking.

Because of the instrumental value of "expressive association" to our democracy, and because contributions constitute an exercise of expressive association, this Court judges contribution ceilings under strict scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam) (*Buckley*); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981) (*Berkeley*). The proponent of contribution limits must demonstrate that such limits are justified by a "compelling interest" and that they are "narrowly tailored" so as not to infringe on speech and association which "does not pose the danger that has prompted regulation." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (*Roberts*); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986) (*MCFL*). This Court has only recognized one "compelling interest" as a justification for campaign finance restrictions: the interest in stemming "corruption" or the "appearance of corruption." *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) (*NCPAC*). Moreover, the Court has defined "corruption" narrowly to encompass only those situations in which money is offered in exchange for political favors. *Id.* at 497. The term "appearance of corruption" is a term of similarly precise denotation which encompasses only a reasonable belief that

political favors are being exchanged for money. Therefore, as proponents of contribution limits, petitioners must demonstrate that corruption (in the precise sense of *quid pro quos*) exists or that the electorate has a reasonable perception of *quid pro quo* corruption.

They can do neither. For empirical studies demonstrate that there is no causal connection between campaign contributions and legislative behavior. This is because the great majority of campaign donors are like the *amici*: they give to campaigns in order to elect like-minded office-holders, not to seek corrupt privilege. Even those few contributors who may seek "access" to legislators are not engaging in corruption because access to elected representatives is a necessary result of all sorts of ordinary political activity. To justify contribution limits on the basis that "access equals corruption" would effectively justify the outlawing of myriad types of perfectly innocent political activity.

Low contribution limits restrict a great deal of non-corrupt political association (that is, contributions which are above the legal limit but not intended to induce political favoritism). Such limits are not narrowly tailored to serve the compelling interest in stemming corruption or its appearance. Therefore, contributors like *amici* are severely burdened by low contribution limits. The court below was thus correct in holding the limits unconstitutional and this Court should do so as well.

ARGUMENT

I. FREE ASSOCIATION FOR EXPRESSIVE PURPOSES IS A FUNDAMENTAL RIGHT PROTECTED BY THE FIRST AMENDMENT.

A. Contributions to candidates are an exercise of the right to free association and are essential to the American system of private campaign finance.

America is the only "country on the face of the earth where the citizens enjoy unlimited freedom of association for political purposes." 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 123 (Phillips Bradley ed., Henry Reeve trans., Vintage Books 1945) (1840). "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Berkeley*, 454 U.S. at 294. Americans give to political campaigns as "part of a powerful and respected tradition of voluntarism." FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE 35 (1992). "[G]iving [to political campaigns] has become expected, perhaps even habitual for millions of Americans." *Id.* at 35. It is the "quintessential political activity for our era." *Id.* at 38. The people's exercise of free association in the form of campaign contributions to candidates is the primary mechanism by which American campaigns are funded both at the federal and state levels. Although presidential candidates receive public funding for the general election,² and although a few states have public financing systems, U.S. Congressional races, presidential primaries, and most state election campaigns are privately financed with voluntary

² Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 (1994).

contributions.³ Millions of individual Americans give hundreds of millions of dollars in every election cycle to fund those campaigns.⁴ They give directly to candidates and also to political action committees (PACs) such as the *amici* which, in turn, donate to candidates. As this Court has recognized, these donors are paying primarily for candidate speech.⁵ Thus, donations are the fuel which produces the political speech which the Court recognizes as crucial⁶ to representative democracy.⁷ In sum, contributions are "central" to "the American way of campaign finance." SORAUF, *supra*, at 35.

Ultimately, all private funding of campaigns originates with individual citizens. A large proportion of private funding consists of individuals' direct contributions to candidates. "Individuals are an important source of

³ "In presidential nomination finance, the generating source of almost all money is the individual contributor." CLIFFORD W. BROWN, JR., *ET AL.*, SERIOUS MONEY 6 (1995).

⁴ Because of record keeping practices, "[i]t is difficult to determine exactly how many individuals make contributions to presidential campaigns . . ." BROWN, *supra*, note 3, at 6. "It is safe to say, however, that over a half million individuals made contributions totaling \$143 million to presidential candidates during the 1988 nomination process, and more than a quarter million made contributions totaling \$82 million during the 1992 process." *Id.*

⁵ For "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates . . . from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

⁶ In order "to be competitive" candidates for presidential nominations "must receive contributions from tens of thousands of individuals." BROWN, *supra*, note 3, at 6.

⁷ "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19. "[M]oney, or having the ability to communicate, is essential to campaigning in contemporary congressional politics . . ." Michael J. Malbin, *Congressional Campaign Finance in 1994* 1 <<http://www.usc.edu/dept/CRF/NET/PAPERS/paper1.html>> (visited May 18, 1999).

contributions and together give more money to candidates than all PACs combined." FILIP PALDA, HOW MUCH IS YOUR VOTE WORTH? 99 (1994). "While it is true that the percentage of congressional campaign funds contributed by PACs has increased steadily since 1972, contributions from individuals remain the single largest source of political funds" Herbert E. Alexander, *The PAC Phenomenon*, 4 <<http://www.usc.edu/dept/CRF/NET/PAPERS/paper2.html>> (visited May 18, 1999). Individuals "pool their contributions" in order to fund elections because few candidates have the wherewithal to fund their own campaigns. *Id.* at 1. As this Court has explained, a group speaks with a louder and more effective voice than any individual.⁸

Associations are inherent in American political campaigns: every campaign necessarily engenders many political associations. These fall into two categories. First, in every campaign there is an association between every donor and the candidate. Second, there are associations among all of the like-minded contributors to the same candidate. This Court has recognized that such associations are deserving of strong judicial protection because of the instrumental role they play in our political life. For, the First Amendment guarantees the "freedom to associate with others for the common advancement of political beliefs," a freedom which "enhance[s]" "effective advocacy" and allows "the citizenry to make informed choices among candidates for office." *Buckley*, 424 U.S. at 14-15 (citations omitted)

As this Court has recognized, political association in the form of individual contributions to candidates serves the function of providing the funds necessary to produce candidate speech. *Buckley*, 424 U.S. at 21. But contributions

⁸ "The right to join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley*, 424 U.S. at 65-66 (citation omitted).

also have an important informational component, for they transmit to candidates information about constituents' interests. Therefore, "[t]o tap individual contributions politicians must pay attention to what their individual constituents want and not simply to the demands of special interest groups." PALDA, *supra*, at 99. Therefore, "[w]ell-organized interest groups are not the only constituency to which politicians must pay heed." *Id.*

Because, "[t]he press and reform advocates seldom emphasize the importance of individual contributions . . . the impression . . . is that [special interest] money dominates politics." *Id.* "This is simply not the case," although political action committees do play an extremely important role in the American system of political finance. *Id.* "PACs raise funds for their activities by seeking voluntary contributions which are pooled together into larger, more meaningful amounts and then contributed to favored candidates or political party committees." Alexander, *supra*, at 1. "Essentially, PACs are a mechanism for individuals who desire to pool their contributions to support collective political activity at a level higher than any individual could achieve acting by themselves." *Id.* Often, as with the instant *amici*, PACs are created to promote a position on a particular political issue. They "provid[e] a process to gather contributions systematically through groups of like-minded persons for whom issues are a unifying element in their political activity." *Id.*

"Some 3,954 PACs were registered with the Federal Election Commission at the end of 1994." *Id.* In addition, there are numerous political action committees organized in states across the country. They are responsible for a great deal of campaign speech in every election year, both in the form of independent expenditures and in the form of contributions to candidates and campaign committees. For example, "[I]n the 1993-94 election cycle, PACs of all kinds raised \$391.0 million and spent \$387.4 million." *Id.* They

"contributed \$189.4 million to 1994 candidates for the Senate and House of Representatives." *Id.*

Like individual contributions, PAC activity combines free speech and association and is essential to our system of private campaign finance. PAC donors "are thus simultaneously exercising speech and association rights which are both protected by the First Amendment." *Id.* PACs "help facilitate fundraising for officeseekers who would find it difficult, costly and inconvenient to solicit each of the PAC's donors on an individual basis." *Id.* PACs perform an informational function over and above that performed by direct individual contributions: they "represent individuals to the politician in much the same way that department stores represent the consumer to the wholesaler." *PALDA, supra*, at 104. They allow people to express their political preferences in an effective and precise manner which may not be possible through direct campaign contributions. As Filip Palda explained,

"[i]f . . . I oppose abortion and favor legalization of drugs, I may not find this mix of ideas in any candidate, but I can give money both to the pro-life movement and to the Libertarians in proportion to how strongly I feel on each question. In this way, my ideas get freer expression than if I gave directly to the major party candidate roughly closest to my way of thinking."

Id. Thus, political association through direct individual contributions to candidates and through the concerted activity of PACs plays a crucial role in our Nation's election campaigns. Contributions provide the wherewithal for all candidate speech in privately financed elections; they provide a means for constituents to demonstrate the depths of their feelings on issues; they facilitate the ability of voters to join their voices with others of like mind and interest; they

allow candidates more easily to solicit funds necessary for campaign speech and to gauge the mood of the electorate. "If men living in democratic countries had no right and no inclination to associate for political purposes," De Tocqueville wrote, "their independence would be in great jeopardy . . ." 2 DE TOQUEVILLE, *supra*, at 115.

B. Because they burden the fundamental First Amendment right of free expressive association, contribution limits are analyzed under "strict" or "exacting" judicial scrutiny.

This Court has made it clear beyond peradventure that contribution limits⁹ like other significant burdens¹⁰ on the fundamental¹¹ First Amendment right¹² of free

⁹ In *Berkeley*, this Court applied "exacting judicial review" to an ordinance limiting contributions to committees formed to advocate positions on ballot issues. 454 U.S. at 294.

¹⁰ "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (*Bates*).

¹¹ This Court accords the highest level of judicial protection to laws which infringe fundamental rights, including the right to free association. In *Elrod v. Burns*, Justice Brennan wrote that "political belief and association constitute the core of those activities protected by the First Amendment." 427 U.S. 347, 356 (1976) (plurality opinion). "The right of association 'lies at the foundation of a free society.'" *Buckley*, 424 U.S. at 25 (citation omitted).

¹² The Court has applied strict scrutiny to laws which threaten First Amendment rights. "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod*, 427 U.S. at 362 citing *Buckley v. Valeo*, 424 U.S. at 64-65. In *Berkeley*, this Court stated that "regulation of First Amendment rights is *always* subject to exacting review." 454 U.S. at 294 (emphasis added).

association¹³ are subject to "strict" or "exacting" scrutiny. Thus, the *Buckley* Court, noting that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association," held that "[i]n view of the fundamental nature of the right to associate, governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Buckley*, 424 U.S. at 24-25, quoting *NAACP v. Alabama*, 357 U.S. at 460-61. Therefore, whether the activities at issue here they are characterized as exercises of "fundamental rights," or of "First Amendment rights," or of the "right to associate for expressive purposes,"¹⁴ or of "protected liberties" or merely as "contributions," limits on these activities must be judged under strict scrutiny.

II. MANY CONTRIBUTIONS DO NOT RESULT IN CORRUPTION OR ITS APPEARANCE AS PRECISELY DEFINED BY THIS COURT

A. This Court defines "corruption" very narrowly.

As explained above, strict scrutiny requires the proponent of a restriction on free association to demonstrate

¹³ In *Kusper v. Pontikes*, this Court explained that "[a]s our past decisions have made clear, a significant encroachment on associational freedom cannot be justified upon a mere showing of a legitimate state interest." 414 U.S. 51, 58 (1973). Rather, a law which "burdens appellees' right to free speech and free association . . . can only survive constitutional scrutiny if it serves a compelling governmental interest. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 225 (1989) (emphasis added).

¹⁴ Where free association is in the service of free speech, the Court has referred to it as "the freedom of expressive association." *Roberts*, 468 U.S. at 618. The *Roberts* Court explained that "[a]n individual's freedom to speak . . . could not be vigorously protected . . . unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* at 622.

that the restriction is "narrowly tailored" to serve a "compelling interest."¹⁵ Because the restriction at issue here is a limitation of campaign finances, the "compelling interest" must be either "corruption" or "the appearance of corruption."

As this Court stated in *NCPAC*, "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." 470 U.S. at 496-97. "Corruption" is very narrowly defined. The *Buckley* Court limited "corruption" to situations where "an unscrupulous contributor exercises *improper* influence over a candidate or officeholder." *Buckley*, 424 U.S. at 30 (emphasis added). In *NCPAC*, this Court explained that

[c]orruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.

470 U.S. at 497. *NCPAC* thus demonstrates that "corruption" is to be defined very narrowly to encompass

¹⁵ "To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest." *Eu*, 489 U.S. at 222 (citations omitted). "[I]nfringements on [the right to associate for expressive purposes] may be justified by regulations adopted to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623.

only situations where "large" financial contributions¹⁶ are given in exchange for official favors. Two elements must be present: something which is of value to a candidate (a large amount of cash or its equivalent given to him or his campaign) and some action on the candidate's part (office holders "giving official favors" or candidates offering "improper commitments").¹⁷ *Id.* at 498. Thus, the definition of "corruption" is narrowly circumscribed--it is as important for what it does *not* include as for what it does. *It does not include the situation where the purported "official favor" is that a candidate maintained or changed his position on an issue.* As the *NCPAC* Court stated,

[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [individuals] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

470 U.S. at 498. Thus, "corruption," in this Court's precise usage, can never include the kind of activity engaged in by millions of individual and associational donors: contributions motivated by the desire to help a favored candidate win election which are given with no desire for political favoritism. A restriction such as the one challenged in the instant case is necessarily "*not* narrowly tailored" because it restricts a great deal of association "that does not pose the

¹⁶ *Buckley* also emphasized that it was only "large" contributions which could raise concerns about *quid pro quos*. See, e.g., 424 U.S. at 28 (contribution limit focuses on "the problem of large campaign contributions") (emphasis added).

¹⁷ *Cf. United States v. Sun-Diamond Growers of California*, 1999 WL 241704 *10 (holding that "in order to establish a violation of 18 U.S.C. § 201(c)(1)(A) [the federal illegal gratuity statute] the Government must prove a link between a thing of value and a specific 'official act' for or because of which it was given").

danger that has prompted regulation." *MCFL*, 479 U.S. at 265.

B. The definition of the "appearance of corruption" is very narrow.

The respondents claim that the "government's burden of proof when it seeks to prevent the *appearance* of corruption is . . . even less demanding [than when it seeks to prove actual corruption]." Respondent Bray's *Brief* 31. However, the "appearance of corruption" rationale is far narrower than respondents would have this Court believe. Just as "corruption" is a term of limited denotation, so also is the term "appearance of corruption." Because "corruption" is a grammatical element of "appearance of corruption," it is important limitation on the meaning of that phrase. To speak about the "appearance of corruption" is thus necessarily to speak about the "appearance" of actual, narrowly defined corruption (that is, "dollars for political favors").¹⁸

The proponents of contribution limits contend that such limits are necessary to address the governmental interest in avoiding the "appearance of corruption." However, they never precisely define what they mean by that phrase. Is it, on the one end of the spectrum, a reasonable belief that large numbers of campaign contributions are being given in exchange for improper commitments from candidates? Or is it, on the other end of the spectrum, a subjective public cynicism about politicians as measured by the latest polling results? Certainly only a reasonable belief in the prevalence of *quid pro quo* corruption would constitute a sufficiently strong interest to justify the restraint of any First Amendment activities. In *NCPAC*, this Court recognized that the "appearance of corruption" is much more

¹⁸ See James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 Regent U. L. Rev. 235, 257 (1998) for a discussion of the limited scope of the "appearance of corruption" rationale.

than public cynicism. Discussing the government's evidence, the Court stated that

the FEC attempted to show actual corruption or the appearance of corruption by offering evidence of high-level appointments in the Reagan administration of persons connected with the PACs and newspaper articles and polls purportedly showing a public perception of corruption. The District Court excluded most of the proffered evidence as irrelevant to the critical elements to be proved: corruption of candidates or public perception of corruption of candidates. *A tendency to demonstrate distrust of PACs is not sufficient.*

NCPAC, 470 U.S. at 499 (emphasis added). As Professor Bradley Smith opined, "it seems very dangerous to suggest that the mistaken view of some could justify restricting the First Amendment liberties of others." Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L. J. 1049, 1067-68 n.113 (1996). Indeed, it seems that the reformers are not only advocating that the "mistaken" view of some should lead to the deprivation of others' freedom, but that even an "unreasonable" view should result in limitations on freedom. However, at the very least, the standard upon which the deprivation of First Amendment rights depends must be that of a reasonable person.

The argument of the reformers "verges on '[corruption is] there even if we can't see it.'" *Id.* (citation omitted). To that extent, the argument is not "open to disconfirmation" and therefore contains within itself no limiting principle. *Id.* The argument cannot be disproven except by proving that subjective perceptions of corruption are wrong. That can only be done by proving the negative proposition that actual corruption does not exist. Because it

cannot be disproven, it must be assumed to be true, and therefore, can serve as the justification for even severe restrictions on freedom. This Court should, decline the invitation to construe the "appearance of corruption" so broadly as to limit severely associational freedoms.

In recent congressional testimony, Commissioner David M. Mason of the Federal Election Commission explained the irony that low contribution limits, which were intended to prevent corruption, may actually be the cause of corruption. David M. Mason, *Anonymity and the Internet: Constitutional Issues in Campaign Finance Regulation* (May 5, 1999).¹⁹ He explained that "we should recall that the whole purpose of the \$1,000 limit is to prevent corruption." *Id.* However, the Federal Election Commission's "enforcement caseload presents some evidence that this \$1,000 limit may no longer advance that purpose, and *may indeed itself become a cause of corruption.*" *Id.* For the limit may be, in effect, so low "as to induce people interested in engaging in politics to participate in illegal schemes to circumvent it with no directly corrupt purpose." *Id.* Noting that the Commission has recently seen a marked rise in the number of "cases involving conduit contribution allegations," Commissioner Mason noted that,

[i]n at least some of these cases it appears that donors were motivated by little else than enthusiasm for a candidate. The sums raised in some instances are only a few thousand dollars, not enough to raise serious corruption concerns, nor in many of these cases were the recipient campaigns apparently aware of any

¹⁹ Testimony before the Subcommittee on the Constitution, Committee of the Judiciary, U.S. House of Representatives (May 5, 1999) (available at 1999 WL 16947304). In his testimony, Commissioner Mason stressed that he was speaking on his own behalf and not for the Federal Election Commission or for the other Commissioners.

extraordinary efforts which might give rise to suspicions of favor-seeking.

It appears that the \$1,000 limit may have become effectively so low that it has itself become a cause of corrupt activity, except that *its circumvention may be motivated in some instances by nothing other than a pure desire to support favored campaigns.* In judicial terms, this raises the question of whether the \$1,000 limit is narrowly tailored in advancing its corruption-preventing rationale.

Id. (emphasis added). As will be shown below, a great deal of candidate speech is funded through individual and group contributions which demonstrate no appearance of corruption whatsoever. Such contributions do not raise the specter of corruption because, in Commissioner Mason's words, the "donors were motivated by little else than enthusiasm for a candidate." *Id.* Since there is no "corruption" or "appearance of corruption" in such donations (because such donors are not giving "dollars for political favors") the \$1,075 contribution limit forbids a great deal of speech "that does not pose the danger that has prompted regulation." *NCPAC*, 470 U.S. at 497; *MCFL*, 479 U.S. at 265.

C. There is no causal link between contributions and legislative behavior.

For several decades, there has been a well-organized movement to promote campaign finance "reform." This movement includes, among others, several of the *amici* who support the position of the petitioners in this case.²⁰ The

²⁰ For example, Common Cause and Public Citizen, groups which submitted *amicus curiae* briefs supporting the petitioners' position.

movement has consistently lobbied state and federal governments to impose ever more restrictive contribution limits. "A fundamental tenet of the reform movement is that money has corrupted the legislative process in America." Smith, *supra*, at 1067. Reformers cite a "rise in the number of PACs and the amount of money they give" to candidates and derive from these data the conclusion "that politicians are under greater influence from campaign contributions than before." PALDA, *supra*, at 95. "[B]ut in fact there is little evidence that politicians are 'selling out' more to contributors." *Id.* "[A] substantial majority of those who have studied voting patterns on a systematic basis agree that campaign contributions affect very few votes in the legislature." Smith, *supra*, at 1068. "Two decades of exhaustive academic research has found no conclusive evidence that election money buys government favors." PALDA, *supra*, at 92.

The "reformers" attempt to prove their point about corruption by "cit[ing] cases where PACs give money to those in power who share their issue positions." Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 *American Journal of Political Science* 2 (1989). However, "[t]he analysis in this literature is anecdotal and unsystematic or is based on correlations." *Id.* That is, "whereas the coincidence of power, votes, and money is established," the authors of these studies have failed to demonstrate "causality." *Id.* Recently, Professor John Lott testified to a congressional committee that a widely recognized problem in that literature is the question of causation: "[A]re donors simply giving money to candidates who they agree with, or are donors giving money to 'bribe' how politicians vote?" John R. Lott, Jr., *Testimony Before the U.S. Senate Committee on Rules and Administration* (March 24, 1999). To test whether donations influence voting, Lott studied how "all congressmen voted from 1975 to 1990." *Id.* He hypothesized that

[i]f contributions cause politicians to vote differently from what they truly would like to do, politicians should behave differently when they are in their last period and no longer face the risk of losing future contributions.

Id. Professor Lott stated that "no statistically significant relationship was found between the reduction in campaign expenditures in a politician's last term and how they voted on legislation." *Id.* In fact, "politicians' voting remains extremely stable over their entire careers." *Id.* In short, reformers have not been able to demonstrate by valid empirical evidence that campaign contributions induce legislators to behave in a corrupt manner. Indeed, as Professor Lott found, the evidence which exists is directly to the contrary. For it is a "finding widely acknowledged in the scholarly community, but seldom reported in the media" that "there is little systematic evidence of a causal connection between the PAC money and congressional voting." John R. Wright, *The Statistical Relationship Between Contributions and Votes* 1 <<http://www.usc.edu/dept/CRF/NET/PAPERS/paper8.html>> (visited May 18, 1999). The inescapable conclusion is that "contributions from large PACs do not generally influence members' voting patterns on issues of interest to these groups." Grenzke, *supra*, at 1.

Statistical studies have been done in order to examine whether and to what extent PAC contributions result in

changes in the official behavior of legislators.²¹ Typically, these studies have examined the question whether legislative roll call votes are influenced by contributions from PACs. They have found that, although there is a correlation between donations and legislative voting, donations do not influence roll call votes or committee behavior. Rather, the studies have found that there are many factors other than contributions which, either individually or combined, have a much greater impact on the official actions of legislators. Among these are: a candidate's personal political beliefs and ideology; candidates' political party affiliations; constituents' view and needs; the level of PAC influence in members' districts and the consequent ability to influence voters in the district; lobbying activity by the PACs; and the ability of PACs to help organize campaigns.

These studies show what the "reformers" fail to grasp: that correlation is not equivalent to causation. In other words, a statistical correlation between two events does not mean that one caused the other. While it may be true that contributions are *correlated* with pro-contributor legislative actions, it does not follow that contributions *induced* the legislators' actions. On the contrary, the most plausible explanation of the available data is that legislative actions induce contributions. "Where contributions and voting patterns intersect, they do so largely because donors contribute to those candidates who are believed to favor their

²¹ See, e.g., John R. Wright, *Contributions, Lobbying and Committee Voting in the U.S. House of Representatives*, 84 *American Political Science Review* 417 (1990) ("lobbying, not money . . . shapes and reinforces representatives' policy decisions"); Grenzke, *supra*, at 1 ("this research finds little evidence that the contributions of 120 PACs affiliated with 10 organizations affected the voting patterns of the House members who served continuously from 1975 to 1982"); and John R. Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 *American Political Science Review* 400 (1984) ("this analysis demonstrates with marked clarity the limited nature of PAC influence").

positions, not the other way around." Smith, *supra*, at 1068. As Professor John Wright has explained,

"[w]hile it is true that contributions and voting tend to vary together . . . this co-variation does not stem from vote-selling and buying behavior on the part of PACs and legislators. Instead, the association is a benign consequence of PACs and legislators engaging in routine partisan and ideological behavior."

Wright, *Statistical Relationship*, *supra*, at 1. Indeed, as noted above, there are many factors other than contributions which tend to influence legislative behavior. Studies which ignore those factors "overestimate the influence of money on [legislative] votes." Grenzke, *supra*, at 2. From the politician's point of view, the most important factor concerning any legislative action is how it will affect his or her chances of election or re-election. In her study of the U.S. House of Representatives, Professor Janet Grenzke questioned PAC officials about the relationship between contributions and legislative actions. "All of the PAC officials agreed that in order to turn access into influence, the PAC must convince the House members that a particular position will improve their electoral prospects." Grenzke, *supra*, at 20. For "[m]embers' electoral prospects are improved by issue positions that generate support from district elites and voters" *Id.* Therefore, a "particular PAC's contribution is not critical because a sizable war chest and votes are forthcoming if there is general support in the district" *Id.* Thus, positions on issues are the most plausible nexus between legislative behavior and contributions. Candidates seeking electoral success must formulate issue positions which will resonate both with likely contributors and with likely voters. "Politicians attract financial support, like votes, because of views they hold.

That their contributors agree with them ought to surprise no one." ALEXANDER HEARD, *THE COSTS OF DEMOCRACY* 86 (1960). A politician's ultimate goal is getting votes; money is, at best, a means to that end. Therefore, a legislator is "unlikely to accept a campaign contribution, which can be used only to attempt to sway voters, in exchange for an unpopular vote, which definitely alienates voters." Smith, *supra*, at 1070.

Any influence which PAC officials may have, therefore, relates not to the contributions they make, but to their ability, if any, to influence electoral outcomes. PACs which have strong grassroots support and organization in a legislator's home district will often be more influential than a PAC which has only money. As an official of a labor PAC told Professor Grenzke: "'labor's work in campaigns is much more important than our direct financial contributions.'" Grenzke, *supra*, at 9. To the extent that there may appear to be a correlation between the size of contributions and PAC influence, it is because the "relative size of a contribution is often representative of the magnitude of other kinds of support a candidate receives from other parts of the organization [e.g., the local organization in the members' district]." *Id.* at 12. As Grenzke concluded

[w]hen positive relationships do emerge, it is because the contributions are consistent with and may be considered a measure of the more important endorsement and campaign activities of the organization, not because PAC contributions influence a pattern of voting by members.

Id. However, even considering the full panoply of support which a PAC may give to a candidate, the "legislative influence of an even entire campaign package may be limited." *Id.* "The misconceptions about the role of contributions in politics come from a lack of proper attention

to the many channels through which people can influence government." PALDA, *supra*, at 95. This inattention "has led reformers to infer too much from the rising trend in contributions." *Id.* The "evidence simply does not show a meaningful, causal relationship between campaign contributions and legislative voting patterns." Smith, *supra*, at 1071.

D. Donors give to political campaigns from motives which do not implicate a concern about corruption or the appearance of corruption: in order to support candidates who already share their views and who have a chance of winning the election, not to buy favors from legislators.

Individuals and groups give to political campaigns for various reasons. Some give in response to the tradition of "good, old-fashioned American voluntarism." SORAUF, *supra*, at 35. Others give to campaigns primarily because they are solicited by friends and associates. However, the greatest number of donors give for public-spirited motives such as attempting to influence policy. "Concern for 'government policy' motivates contributing just as it motivates voting." HEARD, *supra*, at 73. "This concern looms as more important than the desire for some sort of special personal privilege." *Id.* In short, "people give money in order to influence policy and out of a sense of political duty." PALDA, *supra*, at 98.

Most donors "contribute in hopes of influencing the outcomes of elections." Grenzke, *supra*, at 19. They wish to influence public policy by aiding in the election of candidates who are committed to certain positions on issues. Candidates can use their ideas to attract donors because donors give to candidates whose ideas they like. See, generally, CLIFFORD W. BROWN ET AL., *SERIOUS MONEY: FUNDRAISING AND CONTRIBUTING IN PRESIDENTIAL CAMPAIGNS* 140 *et seq.* (1995). Donors do not generally

cross the lines of political ideology.²² "[C]ontributors generally gave to candidates with whom they were ideologically compatible"²³ Moreover, donors contribute primarily to candidates "with a tangible chance of winning," for election to office is the *sine qua non* of effective influence on public policy. SORAUF, *supra*, at 35. Therefore, the "political fortunes of the candidates define the potential contributors' chances of reaching their political goals." *Id.*

In sum, "[t]here is no simple and predictable connection between contributions and the desire for political privilege." HEARD, *supra*, at 69. For "[m]any factors other than hope for special favor prompt donations." *Id.* The decision to contribute "appears to stem from an assortment of political considerations." It is common among public-spirited individuals and groups. SORAUF, *supra*, at 42. Indeed, it "flourishes among those who display unusual levels of political activity, information, and involvement." *Id.*

It is true that in addition to pure public-policy concerns, some donors also contribute to campaigns in order to secure access to the decision-makers who formulate public policy. As Filip Palda has stated, "[c]ontributions do not . . . buy a candidate. Instead, they give interest groups 'access.'" PALDA, *supra*, at 98. For "[c]ontributing is only one means by which a group can get something from government; lobbying is the other means." *Id.* at 101. "Access" can be "equate[d] to a hearing." To the extent that a contribution

²² In a recent survey of donors to congressional campaigns, the candidate's ideology was "always important" to the decision to contribute of seventy percent of the respondents. John Green *et al.*, *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform Minded* 5 <<http://www.crp.org/pubs/donors/donors.htm>> (visited January 27, 1999).

²³ Clifford W. Brown *et al.*, *Serious Money: Fundraising and Contributing in Presidential Nomination Campaigns* 3-4 <<http://www.usc.edu/dept/CRF/NET/PAPERS/paper6.html>> (visited May 18, 1999) (adapted from the book of the same name).

can help in obtaining "access" it "facilitate[s] an opportunity to present one's case" to the decision maker. Grenzke, *supra*, at 19; see also HEARD, *supra*, at 88. Access "does not equate to decisive influence, but means the opportunity to make one's case at crucial times and places." *Id.*

Contrary to the views of the reformers, gaining access to politicians is not equivalent to "corruption or its appearance" in any sense, much less in the narrow way in which this Court has defined those terms. As the District Court for Colorado recently stated:

The . . . attempt to broaden the definition of corruption to include mere access is unsupported by precedent. . . . Buckley . . . recognized that money, in many cases, may grant access to a candidate. It did not, however, conclude that such access is akin to corruption or the appearance of corruption.

Federal Election Commission v. Colorado Republican Federal Campaign Committee, 1999 WL 86840, *12 (D.Colo.). For, as stated above, access primarily involves only the chance to put one's best case before a legislator. In view of all of the other pressures on a legislator, it is not likely that a single contributor will be able to buy a legislator's vote. The

contributor may then be able to shape legislation [, but only] to the extent that such efforts are not incompatible with the dominant legislative motives of ideology, party affiliation and agenda, and constituent views.

Smith, *supra*, at 1070. But a contributor who does not present a balanced case will not be successful in gaining influence.

Lobbyists influence policy by providing legislators with accurate balanced information. As one member of Congress put it, "It doesn't take very long to figure which lobbyists are straightforward, and which ones are trying to snow you. The good ones will give you the weak points as well as the strong points of their case.

PALDA, *supra*, at 102.

Far from being a corrupting influence, donors' access to incumbent decision-makers is an important source of information. "Politicians also need [donors'] help." *Id.* at 101. For "legislation is often difficult to write and subject to piercing intellectual criticism." Therefore, legislators "rely heavily on lobbies to write their speeches and do office chores." Thus, "the exclusion of knowledgeable contributors from the legislative process can just as easily lead to poor legislation . . . as can their inclusion." Smith, *supra*, at 1070. Finally, contributions serve the vital goal of giving legislators information regarding "how deeply certain constituents feel about certain policies." PALDA, *supra*, at 98. "A limit on contributions" has the ill-effect of "reduc[ing] th[e] flow of information" from constituents to their representative. *Id.*

Not only is donors' access to politicians not corrupting, it is very useful in that it provides necessary information to representatives. But even assuming *arguendo* that donors' access were harmful, it is not clear that access by a given contributor will result in policy changes. For "[t]he competition for access . . . is stiff." HEARD, *supra*, at 89. Monetary donors are far from being the only persons who can gain access to politicians. "Money is but one contribution that can be made to electoral success and contributing to electoral success is but one factor affecting access." *Id.* at 89-90. Other types of service rendered to candidates and parties, such as get out the vote drives and

other campaign activity which translate directly into votes, may have much more value to candidates. "[F]ew American politicians will be corrupted for a lesser consideration than the favor of the voters." *Id.*

The reformers paint a broad-brush picture of widespread corruption stemming from campaign contributions, but the empirical evidence simply does not bear them out. The assumption that campaign "money can buy elections and politicians" is both "shaky and largely unproven." PALDA, *supra*, at 109. In fact, few legislators are influenced to act contrary to their obligations of office by the mere prospect of a campaign contribution. "[R]elatively few senators are actually changed by lobbyists from a hostile or neutral position to a friendly one." *Id.* at 102 (citation omitted). In short, "a political gift does not automatically carry . . . [any] influence at all." HEARD, *supra*, at 69.

E. *Amici* and similar donors are responsible for a great deal of political speech. Therefore, low contribution limits have a substantial adverse effect on donors throughout the country.

Private funding of election campaigns is the norm rather than the exception in America. Millions of individuals donate money to campaigns for federal, state and local offices, either directly or through political action committees. These donations constitute the primary fuel for funding campaigns, which are the engine of democracy. Unless they are independently wealthy, candidates are able to engage in "core political speech" in campaigns only through the contributions of their fellow citizens:

Through a single agent, thousands of citizens can pool many small contributions into a large contribution. Such money reflects popular opinion, and when used to buy advertising it

provides the electorate at large with information about issues and candidates.

PALDA, *supra*, at 110. That collective activity in support of widely-disseminated candidate speech is uniquely American and is an aspect of our society which is to be applauded rather than condemned. However, as Filip Palda states "[l]aws of the sort now in the federal statutes, that limit contributions, make it hard for ordinary people to pool their funds." *Id.* at 110. The instant *amici*, their state affiliates and many other donors to state campaigns throughout the country, are heavily burdened by low contribution limits, despite the fact that their donations have no tendency toward corruption or the appearance of corruption.

III. THE COURT BELOW CORRECTLY APPLIED THE FIRST AMENDMENT PROTECTIONS DEVELOPED BY THIS COURT IN INVALIDATING MISSOURI'S CONTRIBUTION LIMIT.

This brief has demonstrated that there is a great deal of First Amendment activity in this country, both free speech and free association, which exists in the form of individual and group contributions to political campaigns. The court below was correct in holding that strict scrutiny analysis was applicable to limits on such contributions, because, *inter alia*, contributions constitute free association. Therefore, the court below was correct in requiring the proponents of the restriction to carry the heavy burden of precisely demonstrating the elements of strict scrutiny, that is, the existence of a compelling governmental interest and narrowly tailored means. *Amici* have also shown that the kind of activity in which they and countless other individuals and groups are involved, namely making contributions to political candidates, does not cause "corruption or its appearance" under this Court's narrow definition of that term. Giving money to candidates in order to aid their chances of election is not the same as vote-buying and is

certainly not "corruption" under this Court's precedents. Even those groups which may attempt to buy "access" to politicians are not giving the "appearance of corruption." Nevertheless, the proponents of contribution restrictions argue for an understanding of the "appearance of corruption" which is so broad that it would justify the restriction of all manner of ordinary political activity; for there are countless situations in which citizens come into contact with politicians. Such access is all to the good: it is the essence of a representative democracy. This Court should be leery of accepting the petitioners' invitation to restrict "retail politics" under the guise of avoiding an unreasonable, subjective perception of corruption.

CONCLUSION

For the above reasons, this Court should affirm the decision of the court below.

Respectfully submitted,

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NATIONAL RIGHT TO LIFE COMMITTEE, INC.
1998 CONGRESSIONAL CANDIDATE
QUESTIONNAIRE

ABORTION

(#1) The National Right to Life Committee (NRLC) believes that unborn children should be protected by law, and that abortion should be permitted only when necessary to prevent the death of the mother. Under what circumstances, if any, do you believe that abortion should be legal?

_____ Only to prevent the death of the mother (the NRLC position).

_____ To prevent the mother's death, in cases of incest, and in reported cases of forcible rape.

Other: (please explain)

NOTE: In every question below, a "yes" response indicates agreement with the position of NRLC.

ROE V. WADE

In its 1973 rulings in *Roe v. Wade* and *Doe v. Bolton*, the U.S. Supreme Court created a "right to abortion" that invalidated the abortion laws of all 50 states.

(#2) Do you support the complete reversal of the *Roe v. Wade* and *Doe v. Bolton* decisions, thereby allowing the state legislatures and the Congress to once again protect unborn children?

YES _____ NO _____

"FREEDOM OF CHOICE ACT"

Pro-abortion members of Congress have proposed a federal law that would invalidate virtually all state restrictions on abortion, including regulations permitted by the Supreme Court. This bill was called the "Freedom of Choice Act" (FOCA), but it has recently been incorporated into the "Family Planning and Choice Protection Act of 1997." As the *Congressional Quarterly Weekly Report* reported, "Among the most controversial provisions [of the FOCA] are those that would prohibit restrictions on third-trimester abortions, overturn several states' requirements that teenagers obtain the consent of one or both parents before having an abortion and prohibit 24-hour waiting periods."

(#3) Will you vote against the "Freedom of Choice Act," the "Family Planning and Choice Protection Act," and any other proposals that would limit the authority of states to restrict abortion?

YES _____ NO _____

PARTIAL-BIRTH ABORTION BAN ACT

In 1996 and in 1997, Congress approved the Partial-Birth Abortion Ban Act, but both bills were vetoed. The bill prohibits *partial-birth abortions*, defined as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery," except to save the life of the mother. The partial-birth abortion procedure is usually used in the fifth and sixth months of pregnancy, and sometimes later; the bill would ban partial-birth abortions before and after "viability."

(#4) Would you vote for the Partial-Birth Abortion Ban Act, and oppose weakening amendments?

YES _____ NO _____

ABORTION FUNDING

Congress annually votes on the "Hyde Amendment," an appropriations "rider" that prohibits federal Medicaid money from being used to pay for abortions or for managed-care plans that include abortion, except to save the life of the mother, or in cases of rape or incest.

(#5) Would you vote for the current Hyde Amendment policy without weakening amendments?

YES _____ NO _____

(#6) Prior to 1993, the Hyde Amendment "exception" applied only to life-of-mother cases. Would you vote to restore the pre-1993 Hyde Amendment, in Order to prohibit federal funding of abortion, except to save the mother's life?

YES _____ NO _____

(#7) Besides Medicaid, would you vote to ban the use of any congressionally appropriated funds for abortion in bills covering the military, federal employees, the District of Columbia, etc., with the same exceptions you indicated above with respect to the Hyde Amendment?

YES _____ NO _____

(8) Federal law prohibits abortions at U.S. military facilities, even if privately funded (except in life of mother or rape or incest cases.) Would you vote against any attempt to weaken or repeal this policy?

YES _____ NO _____

ABORTION IN FEDERALLY DEFINED HEALTH INSURANCE PACKAGES

Many bills for "health care reform" have included provisions under which the federal government would require coverage of abortion in certain types of health insurance plans. Often, such bills do not explicitly mention abortion, but rather contain mandates that invariably will be construed by administrators and/or courts to include abortion (for example, mandating coverage of "medically necessary" or "reproductive" services). Pro-life lawmakers regularly offer corrective amendments to *explicitly exclude* abortion from the scope of such proposed federal mandates.

(#9) Would you vote to explicitly exclude abortion from the scope of any government-mandated or government-funded health coverage?

YES _____ NO _____

(#10) Would you vote against a "health care reform" bill that would force insurers to provide coverage for abortions, or would pay for abortions with tax dollars or government-mandated "premiums"?

YES _____ NO _____

FOREIGN AID FOR ABORTION

The U.S. spends nearly a half-billion dollars annually on family planning/population-control programs in other nations. Under the Mexico City Policy of the Reagan and Bush administrations, organizations that "perform or actively promote abortion as a method of family planning" were ineligible for funds. However, President Clinton canceled this policy. His administration now funds international organizations that perform abortions and campaign to legalize abortion in other nations.

(#11) Would you vote to restore the Mexico City Policy, under which no U.S. funds would go to organizations that provide abortions in other nations (except in life of mother, rape, or incest cases), or that campaign to repeal the pro-life laws of other nations?

YES _____ NO _____

PROTECTION OF HUMAN EMBRYOS

The right to life of human individuals must be respected at every stage of biological development. Human individuals who are at the embryonic stage of development ought not be used for harmful medical experiments or deliberately killed. This applies equally to human beings whose lives have begun through means such as in vitro fertilization -- or cloning, if that occurs. Periodically, Congress votes on the question of whether human embryos should be used for harmful medical experiments.

(#12) Will you vote for measures to protect living human embryos -- including human embryos created through cloning -- from being used for harmful medical experiments or deliberately killed?

YES _____ NO _____

**PARENTAL NOTIFICATION/CONSENT
FOR MINORS' ABORTIONS**

Laws are in effect in 22 states requiring notification or consent of at least one parent (or authorization by a judge) before an abortion can be performed on a minor. However, these laws are frequently circumvented by adults who take minors to abortionists in other states that do not have parental involvement laws. In some cases, the adults engaged in this activity are associated with abortion providers, and may have ideological or financial motives. In other cases, the adults involved seek to conceal acts of statutory rape. In February, 1998, the Child Custody Protection Act was introduced into Congress. This bill would make it a federal offense to transport a girl age 17 or under across a state line for an abortion, if this action would circumvent a state law requiring involvement of a parent or judge in the girl's abortion decision.

(#13) Would you vote for the Child Custody Protection Act and oppose weakening amendments?

YES _____ NO _____

EUTHANASIA

The pro-life movement has always sought to protect not only the unborn from abortion, but also the vulnerable born, especially older or disabled people, from euthanasia. We consider rationing of health care, resulting in the denial of life-saving medical treatment against the will of the patient, to be unacceptable involuntary euthanasia.

MEDICARE RESTRUCTURING

A bipartisan Commission is scheduled to recommend long-term Medicare restructuring proposals to Congress in 1999. We take no position on the appropriate level of government Medicare funding but believe that older Americans should be permitted to add or use their own funds, if they wish, in order to obtain unrationed unmanaged fee-for-service health insurance and health care. Limits on the rate of growth in government Medicare payments will make it unlikely that government payments alone can keep up with the rate of medical inflation. Thus, allowing voluntary supplementation of tax dollars with their own funds will be the only practical way to allow older Americans to obtain unrationed, unmanaged health insurance.

(14) Will you insist that any Medicare restructuring bill for which you vote allows unrationed, unmanaged fee-for-service health insurance as a private market alternative (as did the Balanced Budget Act of 1997)?

YES _____ NO _____

(15) Will you insist that any Medicare restructuring bill for which you vote allows older Americans to add their own money to government payments, if they choose, in order to purchase unrationed, unmanaged fee-for-service health insurance (as did the Balanced Budget Act of 1997)?

YES _____ NO _____

While the Balanced Budget Act of 1997 allows older Americans who choose to pay for health care services without seeking Medicare reimbursement to do so to avoid rationing, it requires doctors who provide them such services to promise not to treat *any* patients for two years whom Medicare reimbursement is sought. Not only does this deny older Americans the right to obtain unrationed live-saving care even when they are willing to pay for it themselves, but it also denies Medicare patients access to some top specialists and prevents cost-shifting which can prevent rationing for low-income older Americans.

(16) Will you vote for measures (such as the Kyl-Archer bill) to allow treatment of patients for whom Medicare reimbursement is sought by a doctor who also provides treatment to older people for whom Medicare reimbursement is not sought?

YES _____ NO _____

USE OF CONTROLLED SUBSTANCES (DRUGS) FOR EUTHANASIA

The Controlled Substances Act generally prohibits the use of dangerous drugs and narcotics. An exception to this prohibition is the legal ability of physicians to prescribe them for what the Drug Enforcement Administration regulations define as a "legitimate medical purpose."

(17) Will you vote for legislation to clarify that drugs whose use is generally prohibited under the Controlled Substances Act may not legally be prescribed or dispensed to assist suicide or for euthanasia?

YES _____ NO _____

POLITICAL SPEECH

In its 1976 ruling in *Buckley v. Valeo* and in recent cases, the Supreme Court has ruled that the First Amendment protects the right of citizen groups (like NRLC) to comment freely on the positions of politicians on issues (called issue advocacy), regardless of proximity to elections, without rationing or restrictions, and without disclosing the names of citizens who donate to support such commentary. The Supreme Court has held that this immunity from regulation extends to "voter guides," TV and radio ads, "scorecards" of votes in Congress, and any other commentary on specific politicians, except communications containing "express advocacy" (see question #19). NRLC is strongly opposed to any legislation that would infringe on our right to disseminate printed or broadcast issue advocacy communications that comment on candidates' positions and voting records, including restrictions on the timing, amount, or funding sources for such speech, or any requirement that the names of donors be reported to the government.

(#18) Will you oppose any legislation (such as the McCain-Feingold bill) that would restrict, regulate, or ration the right of nonprofit corporations (not PACs) such as NRLC to engage in unrestricted commentary (issue advocacy) on the positions and voting records of specific officeholders and officeseekers, such as publication of scorecards and voter guides, without requiring that names of citizens who fund such communications be reported to the government?

YES _____ NO _____

The Supreme Court defines "express advocacy" as communications containing explicit words, such as "vote for" or "defeat" that expressly advocate the election or defeat of a candidate. Express advocacy communications are subjected to extensive restrictions and are usually conducted by highly regulated federal Political Action Committees (PACs).

(#19) Will you oppose any legislation (such as McCain-Feingold) that would place new restrictions on the right of PACs to *expressly advocate* the election or defeat of candidates for federal office -- for example, by requiring those who engage in independent election advocacy to forfeit their rights to communicate with officeholders or officeseekers on public policy, or by granting or denying special benefits to candidates who are deemed to have been helped or hurt by independent political speech?

YES _____ NO _____

The First Amendment guarantees the right of PACs and other speakers to engage in express advocacy without a dollar limit if this activity is not coordinated with a candidate (called independent expenditures.) NRLC opposes any bill that would require groups who conduct independent expenditures to forfeit their rights to communicate with lawmakers or other candidates on public policy matters, or to forfeit other constitutional rights of association (e.g., with pollsters or vendors.)

(#20) Would you oppose legislation that would redefine "coordination" to mean anything except an actual prior communication about a specific expenditure for a specific project which places the expenditure at the direction of or under the control of a candidate, or which causes the expenditure to be made based upon information about the candidate's plans or needs provided by the candidate?

YES _____ NO _____

The term "soft money" is used to refer to political party funds that are not rationed or controlled by the Federal Election Campaign Act (FECA). Such money can be raised and expended by political parties to lobby on issues, to build their grassroots network, or to report on congressional action or politicians' positions on issues. Under rulings of the U.S. Supreme Court, the First Amendment protects the right of groups and parties to sponsor such communications, which discuss issues or the positions of officeholders or officeseekers on those issues, without being subjected to the rationing laws that the FECA applies to communications that contain explicit endorsement of candidates (i.e. "express advocacy"). NRLC opposes any encroachment upon this constitutional right of free speech and believes that freedom of speech and participation in government and issues by a

broad range of groups, including political parties-- not just the media-- is essential to democracy.

(21) Would you vote to uphold the rights of political parties to raise and expend funds to discuss issues or the positions of officeholders or officeseekers on those issues, or to build grassroots networks, without being subjected to any additional restrictions?

YES _____ NO

Signature of Candidate Please print or type name

State Congressional District # Political Party

Name of campaign committee and address

Campaign contact person Date

Phone number FAX number Website

NATIONAL RIGHT TO LIFE COMMITTEE, INC.

February 23, 1998

TO: NRLC Board of Directors and State Offices

FROM: Carol Long, NRL PAC Director

RE: Federal candidate questionnaires

The NRLC candidate questionnaire will be sent to all congressional candidates when the filing deadline is over in a particular state. Some states have made an arrangement with us and I wish to offer that same arrangement to you:

When we send out the questionnaire, we tell the candidate that the information will be shared with our state affiliate. The state affiliate's name and address is included in the cover letter so that the candidate may get in touch with them if he/she hasn't already. When the questionnaire is returned to NRLC, a copy is then sent to the state affiliate. (It's simple: We do the work, you get the information!)

Most of the states participating in this agreement are then using information from the NRLC questionnaire and not sending out their own. If you would like us to do that in your state, please call Heather at (202) 626-8800, extension 138 and let her know.

(This questionnaire is drafted by NRLC and sent to NRLC affiliate organizations for their use in surveying state candidates.)

1998 VOTER INFORMATION QUESTIONNAIRE

Please complete this form and return it to the above address by [date].

PLEASE NOTE: On every question, "YES" is the pro-life response.

ABORTION QUESTIONS

(1) Would you vote for a law that would prevent abortions, except those to prevent the death of the mother?

YES____ NO____

(2) If it was not possible to pass such a law, would you vote for a law that would prevent abortions, except those to prevent the death of the mother, when the pregnancy is the result of forcible rape (reported to law enforcement agencies within 7 days), or when the pregnancy of a minor is the result of incest (with the perpetrator reported to law enforcement agencies)?

YES____ NO____

(3) Would you vote for a law that would prevent the use of abortion as a means of birth control?

YES____ NO____

(4) Would you vote for a law that would prevent abortion for sex selection?

YES____ NO____

(5) Would you vote in favor of the Partial-Birth Abortion Ban Act and oppose weakening amendments?

YES____ NO____

(6) Would you vote to require parental notification before abortions are performed on minors?

YES____ NO____

(7) Would you vote to require parental consent for abortions on minors?

YES____ NO____

(8) Would you vote for an "informed consent" law requiring that doctors provide information on the development of the unborn child, alternatives to abortion, and medical risks of abortion before an abortion is performed?

YES____ NO____

(9) Would you vote for an educational program to provide public information about the development of the unborn child and about alternatives to abortion?

YES____ NO____

(10) Would you vote for a law to get government out of the abortion business by preventing the use of state facilities to perform abortions not necessary to prevent the death of the mother, and to prevent state employees from performing, referring or counseling for abortions, other than those necessary to prevent the death of the mother?

YES____ NO____

(11) Would you vote to prevent the use of tax funds for abortion other than to prevent the death of the mother?

YES____ NO____

(12) If it was not possible to pass the law described in #10, would you vote to prevent the use of tax funds for abortion other than to prevent the death of the mother, when the pregnancy is the result of forcible rape (reported to law enforcement agencies within 7 days), or when the pregnancy of a minor is the result of incest (when the perpetrator of the crime is reported to a law enforcement agency)?

YES____ NO____

(13) Would you oppose the establishment or funding of "health clinics" in secondary schools, unless they are explicitly prohibited from performing abortion counseling or referral or referring students to any entity which counsels for, refers for or does abortions?

YES____ NO____

(14) Would you vote to prevent the use of tissue and organs from deliberately aborted children in transplants or medical experiments?

YES____ NO__

(15) Would you vote to oppose any ERA (Equal Rights Amendment), unless it contained explicit "abortion neutralization" language?

YES____ NO____

(16) Would you oppose the testing and marketing of "RU 486" in the United States for abortion?

YES__ NO____

WELFARE REFORM

Recently there have been proposals, both on the state and federal level which would prohibit the use of public funds to provide financial assistance for a child who would otherwise qualify, but was either born to a mother already receiving assistance for an older child (the "family cap") or born to an unmarried woman under 18. The single-issue pro-life movement is opposed to segregating specific groups of children, who are already vulnerable to abortion, for a mandatory denial of aid, instead of treating all poor children equally. Some proponents of these proposals have agreed that they would cause more abortions.

(17) Would you vote to allow financial aid to a child whose mother is an unwed minor, provided the mother stays in school and lives under approved adult supervision?

YES__ NO_____

(18) If additional cash assistance was prohibited for another child to a mother already receiving welfare, would you vote to allow vouchers to be provided for goods and services suitable for the care of the additional child in place of cash assistance?

YES___ NO___

EUTHANASIA QUESTIONS

(19) Would you vote to prevent involuntary denial of life-saving treatment by providing that in cases where a health care provider is unwilling to provide treatment, food or fluids that is desired by the patient or the patient's surrogate and that in reasonable medical judgement is necessary to prevent the patient's death, the provider must allow the patient to be transferred to a willing provider *and provide the treatment pending transfer*?

YES___ NO___

(20) In 1991, Oregon approved a health care rationing plan for its Medicaid program. The primary basis for denial of treatment is the expected degree of disability or poor "quality of life" it is claimed a patient would be likely to have after treatment. This is a form of involuntary euthanasia. Would you vote to oppose any legislation in this state that, like the Oregon plan, would impose rationing that intentionally denies treatment **on the basis** of disability or "quality of life" of those denied treatment?

YES___ NO___

(21) Would you support a law to prevent "assisting suicide" by allowing relatives or others affected by an attempted or completed suicide, as well as public officials, to sue the person who "assists" for money damages?

YES___ NO___

(22) Would you oppose any legalization of lethal injections or other measures to kill a person or to "assist" in committing suicide, or "active euthanasia"?

YES___ NO___

POLITICAL SPEECH

In its landmark 1976 ruling in *Buckley v. Valeo* and in more recent cases, the Supreme Court has ruled that the First Amendment protects the right of citizen groups to comment freely on the positions of politicians on various issues (called issue advocacy), regardless of proximity to elections, without government-imposed rationing or restrictions, and without disclosing the names of citizens who donate funds to support such commentary. The Supreme Court has held that this immunity from government regulation extends to "voter guides," TV and radio ads, "scorecards" of votes in Congress, and any other commentary on specific politicians, except communications containing "express advocacy" (see next question). The National Right to Life Committee and its affiliates are strongly opposed to any legislation that would infringe on the right of groups to disseminate printed or broadcast issue advocacy communications that comment on candidates' positions and voting records, including any restrictions on the timing, amount, or funding sources for such speech, or any requirement that the names of their donors be reported to the government.

(#23) Will you oppose any legislation that would restrict, regulate, or ration the right of nonprofit corporations (not PACs) to engage in unrestricted commentary (issue advocacy) on the positions and voting records of specific officeholders and officeseekers, such as publication of congressional scorecards and voter guides, or any legislation that would require that names of citizens who fund such communications be reported to the government?

YES _____ NO _____

The Supreme Court defines "express advocacy" as communications containing explicit words that expressly advocate the election or defeat of an identified candidate, such as "vote for Smith" or "defeat Jones." The Court has held that express advocacy communications can be subject to reporting requirements and other modest regulation.

(#24) Will you oppose any legislation that would place new restrictions on the right of citizen groups to *expressly advocate* the election or defeat of candidates for state office -- for example, by requiring those who engage in such independent election-oriented advocacy to forfeit their rights to communicate with officeholders or officeseekers on public policy matters, or by granting or denying special benefits to candidates who are deemed to have been helped or hurt by independent political speech?

YES _____ NO _____

Signature of Candidate

Date

Please print or type name

Political Party

State

District #

Name of campaign committee and address

Campaign contact person

Phone numbers

**MISSOURIANS FOR RIGHT TO WORK
1998 CANDIDATE SURVEY**

1. A state Right to Work Law provides that no worker can be denied a job because he or she either joins or does not join a labor union. Such a law guarantees that each individual worker can freely choose whether or not to support a union.

**WILL YOU SUPPORT ENACTMENT OF A
STATE RIGHT TO WORK LAW BY THE
MISSOURI GENERAL ASSEMBLY?**

_____ YES

_____ NO

2. As they tried to do earlier this year with Senate Bill 471, union officials have historically sought to gain bargaining powers over public employees. But in seeking such powers, union officials have not sought to bargain solely for those government workers who would join a union. Instead, they also demand the monopoly power to bargain for every person employed within a work unit -- including those individuals who do not desire union representation. For this reason, Right to Work supporters oppose any imposition of monopoly bargaining over public employees by union officials.

**WILL YOU OPPOSE ANY EXTENSION OF
MONOPOLY BARGAINING OVER PUBLIC
EMPLOYEES BY UNION OFFICIALS?**

_____ YES

_____ NO

3. In the public sector, "agency shop" clauses in so-called collective bargaining agreements compel public employees who choose not to join a union to pay up to 100% of union dues. The employees are forced to pay or be fired even if they do not want union representation.

**WILL YOU OPPOSE LEGISLATION
DESIGNED TO GRANT "AGENCY SHOP"
PRIVILEGES TO OFFICIALS OF PUBLIC-
SECTOR UNIONS?**

_____ YES

_____ NO

(over)

Additional Comments:

Signed: _____ Date: _____

(Unsigned surveys cannot be accepted for publication.)

Please return completed and signed surveys by June 26, 1998
to:

Missourians for Right to Work
1806 W. 11th St.
P.O. Box 1386
Sedalia, MO 65302

**Tennessee Right to Work Committee
1998 Candidate Survey**

1. Enacted in 1947, Tennessee Code sections 50-1-201 through 204 provide that no worker can be denied a job because he or she either joins or does not join a labor union. Tennessee's Right to Work Law guarantees that each individual worker can freely choose whether or not to join or financially support a labor union.

**WILL YOU OPPOSE ALL EFFORTS TO
WEAKEN OR REPEAL TENNESSEE'S RIGHT
TO WORK LAW?**

_____ YES

_____ NO

2. From time to time legislation is introduced in the Tennessee Legislature to force working men and women who have chosen not to join or support a labor union to pay union dues -- so-called "agency fees" -- to a labor union, or risk being taken to court or even fired.

**WILL YOU OPPOSE ALL ATTEMPTS TO
FORCE WORKERS IN TENNESSEE TO PAY
UNION DUES OR FEES TO AVOID BEING
SUED OR FIRED?**

_____ YES

_____ NO

3. In the last session, two bills (H.B. 981, S.B. 1832) were introduced that would have allowed Davidson County Metropolitan government to negotiate legally binding Memoranda of Understanding (MOU) with public employee unions. It was clear that union officials intended to use this MOU as a mechanism to establish themselves as the monopoly bargaining agent for all county employees.

In seeking such monopoly bargaining powers, union officials have not sought to bargain solely for those workers who would voluntarily join a union. Instead, they also demand the power to bargain for every person employed within a work unit -- including those individuals who do not desire union representation.

(over)

In the past, public sector union officials in Tennessee have attempted but failed to pass similar legislation with statewide coverage. Right to Work believes that that public sector unions have changed their strategy and now intend to force union representation upon Tennessee's public employees one county at a time.

For these reasons, Right to Work supporters oppose any imposition of monopoly bargaining over any public employees by union officials.

WILL YOU OPPOSE ANY AND ALL ATTEMPTS TO GRANT UNION OFFICIALS MONOPOLY BARGAINING POWERS OVER ANY PUBLIC EMPLOYEES IN TENNESSEE?

_____ YES

_____ NO

Additional Comments:

Signed: _____ Date: _____

(Unsigned surveys cannot be accepted for publication.)

Please return completed and signed surveys by July 6, 1998
to:

**Tennessee Right to Work Committee
2166 Venture Drive
Building E
Memphis TN 38131**

**National Right to Work Committee
1998 Georgia Candidate Survey**

1. Enacted in 1947, Georgia Code sections 34-6-20 through 34-6-28 provide that no worker can be denied a job because he or she either joins or does not join a labor union. Georgia's Right to Work Law guarantees that each individual worker can freely choose whether or not to join or financially support a labor union.

**WILL YOU OPPOSE ALL EFFORTS TO
WEAKEN OR REPEAL GEORGIA'S RIGHT
TO WORK LAW?**

_____ YES

_____ NO

2. From time to time legislation is introduced in the Georgia Legislature to force working men and women who have chosen not to join or support a labor union to pay union dues -- so-called "agency fees" -- to a labor union, or risk being taken to court or even fired.

**WILL YOU OPPOSE ALL ATTEMPTS TO
FORCE WORKERS IN GEORGIA TO PAY
UNION DUES OR FEES TO AVOID BEING
SUED OR FIRED?**

_____ YES

_____ NO

3. In the last session, legislation (H.B. 1462) was introduced that would have given union officials bargaining powers over public employees. In seeking such powers, union officials have not sought to bargain solely for those workers who would voluntarily join a union. Instead, they also demand the monopoly power to bargain for every person employed within a work unit -- including those individuals who do not desire union representation. For this reason, Right to Work supporters oppose any imposition of monopoly bargaining over public employees by union officials.

**WILL YOU OPPOSE ANY AND ALL
ATTEMPTS TO GRANT UNION OFFICIALS
MONOPOLY BARGAINING POWERS OVER
GEORGIA'S PUBLIC EMPLOYEES?**

_____ YES

_____ NO

(Over)

Additional Comments:

Signed: _____ Date: _____

(Unsigned surveys cannot be accepted for publication.)

Please return completed and signed surveys by June 22,
1998 to:

National Right to Work Committee
8001 Braddock Road
Springfield, VA 22160

You may fax your reply to (703) 321-7342. However, if you do so, please also return your signed survey form in the enclosed postage-paid envelope.

NATIONAL RIGHT TO WORK COMMITTEE
1998 Michigan Candidate Survey

1. A state Right to Work Law provides that no worker can be denied a job because he or she either joins or does not join a labor union. Such a law guarantees that each individual worker can freely choose whether or not to support a union.

**WILL YOU SUPPORT ENACTMENT OF A
STATE RIGHT TO WORK LAW BY THE
MICHIGAN LEGISLATURE?**

_____ YES _____ NO

2. The State of Michigan has granted public sector union officials the monopoly power to bargain for every person employed within a work unit -- including those individuals who do not desire union representation. Monopoly Bargaining usurps employees' right to bargain on their own behalf and inevitably leads to poorer service at higher costs. For these reasons Right to Work supporters oppose any imposition of monopoly bargaining over public employees by union officials.

**WILL YOU SUPPORT LEGISLATION THAT
ENDS MONOPOLY BARGAINING OVER
PUBLIC EMPLOYEES BY UNION OFFI-
CIALS?**

_____ YES _____ NO

3. In the public sector, "agency shop" clauses in so-called collective bargaining agreements compel public employees who choose not to join a union to pay up to 100% of union dues. The employees are forced to pay or be fired even if they do not want union representation.

**WILL YOU SUPPORT LEGISLATION
TERMINATING "AGENCY SHOP" PRIV-
ILEGES FOR PUBLIC-SECTOR UNION
OFFICIALS?**

_____ YES

_____ NO

(OVER)

4. Legislation has been introduced in the current legislature (H.B. 4501) that would ban the hiring of permanent replacement workers during an economic strike. Under this bill any worker who crosses a picket line could be subject to the loss of his or her job at the end of the strike. Such legislation would force workers to support any strike called by the union hierarchy.

**WILL YOU OPPOSE LEGISLATION
INTENDED TO DIRECTLY OR INDIRECTLY
BAN THE HIRING OF PERMANENT RE-
PLACEMENT WORKERS DURING ECONO-
MIC STRIKES?**

_____ YES

_____ NO

Additional Comments:

Signed: _____ Date: _____

(Unsigned surveys cannot be accepted for publication.)

Please return completed and signed surveys by July 2, 1998
to:

**National Right to Work Committee
8001 Braddock Road
Springfield, VA 22160**

You may fax your reply to (703) 321-7342. However, if you do so, please also return your signed survey form in the enclosed postage-paid envelope.

**NATIONAL RIGHT TO WORK COMMITTEE
1998 Texas Candidate Survey**

1. A state Right to Work Law provides that no worker can be denied a job because he or she either joins or does not join a labor union. Such a law guarantees that each individual worker can freely choose whether or not to support a union.

**WILL YOU OPPOSE ANY EFFORT TO
WEAKEN OR REPEAL TEXAS' RIGHT TO
WORK LAW?**

_____ YES

_____ NO

2. Texas law prohibits public-sector monopoly bargaining for union officials. Because of this, individual workers are free to bargain for themselves. Just last year, however, legislation was introduced -- H.B. 586 -- which would have given government union officials the power to bargain in the name of every individual employed within a work unit, including those who, under the Right to Work Law, do not desire union representation. Right to Work supporters oppose any imposition of monopoly bargaining over public employees by union officials.

**WILL YOU OPPOSE GRANTING UNION
OFFICIALS MONOPOLY BARGAINING
POWERS OVER STATE EMPLOYEES?**

_____ YES

_____ NO

3. Recently, legislation has been introduced in several states that would force working men and women who have chosen not to join or support a labor union to pay the equivalent of union dues -- so-called "agency fees" -- to the union bosses, or else risk being taken to court and sued.

**WILL YOU OPPOSE ALL ATTEMPTS TO
FORCE TEXAS WORKERS TO PAY UNION
DUES OR FEES TO AVOID BEING SUED OR
FIRED?**

_____ YES

_____ NO

(OVER)

4. In 1997, legislation was introduced in the Texas state legislature -- S.B. 823 -- which would have forced governmental entities to withhold union dues from the checks of public-sector workers. This legislation would have turned local governments into collection agencies for union officials. In his veto message, Governor Bush stated, "This legislation is unnecessary, [and] is contrary to the principles of Right to Work."

**WILL YOU OPPOSE ANY LEGISLATION
FORCING LOCAL GOVERNMENTS TO
WITHHOLD UNION DUES FROM WORKERS'
PAYCHECKS?**

_____ YES

_____ NO

Additional Comments:

Signed: _____ Date: _____

(Unsigned surveys cannot be accepted for publication.)

Please return completed and signed surveys by June 26,
1998 to:

**National Right to Work Committee
8001 Braddock Road
Springfield, VA 22160**

You may fax your reply to (703) 321-7342. However, if you do so, please also return your signed survey form in the enclosed postage-paid envelope.

No. 98-963

Supreme Court, U.S.

FILED

JUN 7 1999

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JEREMIAH W. NIXON, *et al.*,

Petitioners,

—v.—

SHRINK MISSOURI GOVERNMENT PAC, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL
LIBERTIES UNION, THE ACLU OF EASTERN MISSOURI,
AND THE ACLU OF KANSAS AND WESTERN MISSOURI,
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to protecting the First Amendment rights of all persons, regardless of their partisan political interests or affiliations. The ACLU of Eastern Missouri, and the ACLU of Kansas and Western Missouri, are local affiliates of the national organization.

For the past twenty-five years, the ACLU has been deeply involved in the debate over government regulation of campaign speech. Indeed, the ACLU was centrally involved in the very first cases brought under the Federal Election Campaign Act, 2 U.S.C. §431 *et seq.* (FECA). See *United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973)(three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975). Those two cases helped fashion various doctrines to limit the impermissible reaches of FECA.

The New York Civil Liberties Union, another local affiliate of the ACLU, was one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976)(*per curiam*). And, since *Buckley*, the ACLU has participated in numerous political speech cases decided by this Court, both as direct counsel and as *amicus curiae*. See, e.g., *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *McIntyre v. Ohio Elections*

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Committee, 514 U.S. 334 (1995); *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996).

STATEMENT OF THE CASE

This case challenges a set of contribution limits adopted by the Missouri legislature in July 1994.² As originally enacted, Senate Bill 650 (SB 650) prohibited any person, which was defined for these purposes to include a political action committee, from contributing more than \$1,000 to a candidate for statewide office, \$500 to a candidate for state senate, and \$250 to a candidate for state representative. Because the statute also included a periodic adjustment for inflation, these numbers had risen by the time of the lawsuit to \$1075, \$525, and \$275 per candidate per election.³

In March 1998, the Shrink Missouri Government PAC, a registered political action committee, and Zev David Fredman, a prospective candidate for the Republican nomination for Auditor, a statewide elective office, filed suit. The committee claimed that SB 650 prevented it from making contributions larger than the specified amounts to state and local candidates whose views it shared and whose candidacies it

² The challenged limits went into effect in December 1995 after the Eighth Circuit struck down an even more stringent set of limits that had been adopted by the Missouri voters through the ballot initiative process. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

³ SB 650 also contained "voluntary" expenditure limits. Candidates who accepted spending limits set by the State were entitled to receive contributions from political parties, PACs, corporations and unions; candidates who did not accept the state's spending limits were restricted to seeking support from individuals only. Recognizing the coercive nature of this so-called "voluntary" scheme, the Eighth Circuit struck down the spending limits in *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1083 (1996).

wished to enable and support. (J.A. 17). From his perspective as a candidate, Fredman alleged that SB 650 prevented him from raising the money necessary to compete in the Republican primary scheduled for August 1998. As someone who had never run for statewide office before, and who needed to continue to work during the campaign, Fredman asserted that he had neither the time nor the political connections to raise funds in small amounts from large numbers of people who had never heard of him. Accordingly, he claimed, his ability to get his message to the electorate depended on his ability to ask those who did know and support him for contributions in excess of the statutory ceiling. (J.A. 13-14).⁴

The district court granted the state's motion for summary judgment and upheld the constitutionality of Missouri's contribution limits. 5 F.Supp.2d 734 (E.D.Mo. 1998). Because Missouri does not record legislative history, the Court placed great weight on an affidavit submitted by a co-sponsor of the bill who asserted, in conclusory fashion, that the appropriate legislative committee "had heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence." *Id.* at 758. Based almost exclusively on this *post hoc* representation,⁵ the district court held that the State had carried its burden of establishing "real harm." The court supported its conclusion by noting that the legislature is "uniquely qualified" to assess the risk of corruption and

⁴ Although Fredman lost the Republican primary for State Auditor, he received more than 40,000 votes, which represented 20% of the total ballots cast.

⁵ The Court also referred to two publicized instances in which contributions in excess of \$20,000 -- and thus far above the contribution limits set by SB 650 -- had apparently been followed by government action favorable to the contributors. *Id.*

by further noting that "a perception of influence peddling is 'real harm' regardless of whether such peddling is actually afoot." *Id.*⁶

On appeal, the Eighth Circuit reversed by a 2-1 vote. 161 F.3d 519 (1998). Writing for the majority, Chief Judge Bowman held that Missouri's contribution limits failed to survive the strict scrutiny that this Court's decisions required.

We will not infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago. The State therefore must prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions.

Id. at 522. The majority then found that Missouri had "failed to come forward with evidence to prove a compelling interest that would be served by the restrictions SB 650 imposes on campaign contributions." *Id.* In addition, Chief Judge Bowman concluded that SB 650 failed the "narrow tailoring" requirement of strict scrutiny because, by today's standards, its limits are so small that "they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms." *Id.*⁷

⁶ On July 23, 1998, a panel of the Eighth Circuit granted an injunction pending appeal, thus staying the enforcement of the contribution limits on behalf of all candidates and contributors. 151 F. 3d 763. As a result, Shrink Missouri Government PAC was able to make an additional modest contribution to candidate Fredman for use in the August 4th Republican primary. (J.A. 51).

⁷ Judge Ross did not join this portion of Chief Judge Bowman's opinion.

SUMMARY OF ARGUMENT

The narrow question before the Court is whether Missouri's contribution limits can be upheld under *Buckley*. For the reasons persuasively set forth in the Eighth Circuit's opinion, we believe the answer to that question is no. More fundamentally, however, this case offers the Court an opportunity to reexamine its approach to contribution limits in the light of a quarter century of factual evidence not available to the Court in 1976. *Buckley* proceeded on the assumption that contribution limits provide a meaningful check on the corrupting influence of money in the electoral system. Twenty-three years later, there is more money in politics than ever before. The First Amendment bargain that *Buckley* struck in upholding contribution limits simply has not paid off. We respectfully submit that it is time to consider a different approach that is both more consistent with First Amendment values and has a greater chance of achieving its stated goals.

1. In striking down Missouri's contribution limits, the Eighth Circuit relied on three well-established First Amendment principles, two of which are derived from *Buckley* itself. First, political contributions, as well as political expenditures, are core constitutional activities affecting freedom of expression and freedom of association. 424 U.S. at 14. Second, contribution limits, as well as expenditure limits, are therefore subject to "the closest scrutiny." *Id.* at 25. Third, whenever the government attempts to regulate speech, it "must demonstrate that the harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995).

Missouri has utterly failed to make that showing in this case. Instead, the state's defense of its limits begins and ends with the talismanic reference to corruption and the ap-

pearance of corruption. If that is all that *Buckley* requires, the opinion could have been much shorter than it was, including its section on contribution limits. This Court, however, has never permitted First Amendment rights to be overridden so casually. To the contrary, the Court has repeatedly recognized that heightened scrutiny is defined by its insistence that the government do more than "posit the existence of the disease to be cured." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994). Accordingly, the debate over whether contribution limits are subject to strict scrutiny or intermediate scrutiny is almost beside the point. On this barren record, petitioners can prevail only if contribution limits are not subject to any First Amendment scrutiny at all. As the Eighth Circuit properly recognized, that is clearly not the holding of *Buckley*.

2. On the other hand, *Buckley* plainly does hold that contribution limits can be sustained, on a proper record, because of the state's interest in curbing corruption or the appearance of corruption. Experience has proved otherwise. Political spending has not decreased because of contribution limits, it has merely been diverted into other channels -- primarily PACs, soft money, and issue advocacy -- most of which are beyond regulatory control under this Court's First Amendment precedents. As a result, the rationale that *Buckley* relied on to uphold contribution limits in 1976 is no longer persuasive twenty-three years later. Instead, we have been left with a regulatory scheme that has not leveled the playing field between challengers and incumbents, has not halted the spiraling cost of political campaigns, has not restrained the political spending of wealthy contributors, and has not reduced the access of wealthy contributors to candidates and elected officials. What the current system has accomplished, perversely, is to force all candidates to spend more time fundraising than ever before, and to diminish the ability of insurgent candidates to bring their messages to the

electorate. Such a misguided scheme might be merely regrettable if we were not dealing with First Amendment rights. Because we are dealing with First Amendment rights, such an imprecise fit between means and ends is clearly unconstitutional.

The answer does not lie in more limits, more loopholes, and more public cynicism. Rather, it lies in a serious system of public financing coupled with technologically facilitated disclosure of private contributions and faith in the ability of voters to judge where their own best interests lie. By focusing our efforts in this direction, we are far more likely to accomplish meaningful reform and far less likely to run afoul of the First Amendment.

ARGUMENT

I. MISSOURI'S RESTRICTIVE LIMITS ON POLITICAL CAMPAIGN CONTRIBUTIONS CANNOT BE SUSTAINED UNDER *BUCKLEY*

The First Amendment issues in this case are starkly posed. The only record evidence offered by the state to support its contribution limits was a litigation affidavit prepared by one of the bill's co-sponsors who asserted that, before enacting the law, Missouri's legislature had "heard testimony and discussed" the need to balance the risk of corruption (both real and perceived) against the right to support the candidate of one's choice. The state and its supporting *amici* argue that this should be enough because nothing more can ever be shown. There are two serious flaws with that argument, however. It is not true that nothing more can ever be shown. In *Buckley*, the Court pointed to "deeply disturbing examples surfacing after the 1972 election demonstrat[ing] that the problem [of corruption] is not an illusory one." 424 U.S. at 27 (footnote omitted). Here, by contrast, there is nothing in the record to suggest that campaign con-

tributions posed a serious problem of corruption in Missouri either before the imposition of limits in 1994 or after those limits were stayed by the Eighth Circuit in July 1998. Furthermore, if nothing more can be shown, the answer in our constitutional regime ought not to be the suppression of speech.

In an attempt to camouflage their absence of proof, petitioners attack the strict scrutiny standard adopted by the Eighth Circuit as inconsistent with *Buckley*. In fact, the Eighth Circuit's insistence on *some* evidence to support the contribution limits in this case is far more faithful to *Buckley* than petitioners' alternative. Specifically, the diluted standard of review that petitioners advocate is not intermediate scrutiny as that term is generally understood in First Amendment jurisprudence. Rather, what petitioners seek is near total deference to unsupported legislative judgments regarding the appearance of corruption despite this Court's unequivocal recognition in *Buckley* that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Id.* at 14.

To be sure, *Buckley* is not always entirely clear on the standard of review that the Court is applying. It is noteworthy, however, that the critical section on contribution limits begins by quoting *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958), for the proposition that government "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Buckley*, 424 U.S. at 25. The Court then goes on to say that infringements on that right must be "closely drawn" to advance "a sufficiently important interest." *Id.* In the abstract, one could perhaps argue that the reference to "a sufficiently important interest" rather than "a compelling interest" was meant to signal something other than traditional strict scrutiny. But that argument has far less force in the context of the *Buckley* opinion itself, where the Court concludes its discussion of contri-

bution limits with an explicit reference to the "rigorous standard of review established by our prior decisions." *Id.* at 29. Moreover, the very same paragraph that contains the reference to "a sufficiently important interest" ends by citing three classic strict scrutiny cases. *Id.* at 25, citing *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Read in its entirety, the *Buckley* opinion clearly proceeds on the assumption that important First Amendment values are imperiled by contribution limits as well as expenditure limits. Both activities, the Court explained, go to the core of the First Amendment: "It can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." 424 U. S. at 15, quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

More generally, the Court has consistently given close scrutiny to all laws, whether they impact political speech and activities or other important realms of communication, where government seeks to impose financial penalties or restraints on the ability of speakers to fund their speech. See, e.g., *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (striking down limits on contributions to referendum campaigns); *Meyer v. Grant*, 486 U.S. 414 (1988) (striking down a ban on paying canvassers to solicit signatures for a ballot initiative); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. ___, 119 S.Ct. 636 (1999) (striking down a law requiring paid canvassers to identify themselves); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991) (striking down a law barring payment to convicted felons who write about their crimes); *United States v. National Treasury Employees Union*, 513 U.S. 454 (striking down a ban on honoraria for federal employees even when they

write on subjects unrelated to their jobs); *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988)(striking down a law designed to limit charitable solicitations by organizations with high overhead or soliciting expenses); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)(same).

In all of these cases, this Court recognized that burdens on the funding of political or other ideas must be closely scrutinized because of the restraints they impose on the communication of those ideas themselves. Of course, burdens on the funding of political campaign speech are no exception to this rule. Indeed, they are the most insistent occasion for application of the rule because participants in the political process are engaging in speech at the core of the First Amendment's concern and at the precise moment when the public is paying attention. This is particularly so when government is insisting that such core speech must be restrained because of the less than tangible harms it supposedly entails.

The Court's most recent campaign finance decision turned on precisely this principle. Thus, in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, the Court refused to assume that independent spending by a political party in support of its candidate was inherently corrupting. Instead, the Court held:

[The fact of independence] prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system. The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures. See

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664 (1994).

518 U.S. at 617-18.⁸

It is significant that the Court rested this principle on *Turner*, which was not a strict scrutiny case. Even when applying intermediate scrutiny, the Court has required more supporting proof than the government offers here. At best, the government's approach represents a variation on rational basis review, see *Heller v. Doe*, 509 U.S. 312 (1993), that the Court has never applied to the First Amendment.

The Court made a similar point, again citing *Turner*, when it held that the federal government's concern about the appearance of corruption was insufficient to bar the vast majority of federal employees from receiving honoraria from writing or speaking on subjects unrelated to their employment. "[W]hen the Government defends a regulation of speech . . . it must do more," the Court wrote, "than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 513 U.S. at 475.

Petitioners do not and cannot contend that the conclusory affidavit of a self-interested legislator is adequate to meet this First Amendment standard.⁹ Instead, petitioners argue

⁸ To be sure, the plurality opinion in *Colorado Republican* was considering a ban on independent expenditures, not a limit on campaign contributions, and the plurality opinion did remark on the "fundamental constitutional difference" between independent expenditures and contributions to candidates for their speech. 518 U.S. at 614. We will address the continued validity of that constitutional divide in Point II, *infra*.

⁹ Aside from the interest every legislative body has in seeing its enact-
(continued...)

that Missouri's contribution limits do not trigger this First Amendment standard because they have only a marginal impact on First Amendment rights. This argument rests on two premises, both of which purport to derive from *Buckley* but neither of which can in fact withstand scrutiny.

1. Petitioners claim that the Missouri statute must be constitutional because it adopts the same \$1,000 limit on contributions that *Buckley* upheld. This claim is true only in the most superficial sense. It does not take sophisticated economic analysis to know that \$1,000 is not worth today what it was worth in 1976. Translated into *Buckley* currency, Missouri's contribution limit for statewide elections is approximately \$350. Petitioners dismiss the significance of this disparity but it has important real world consequences. Under Missouri's limits, it now takes three contributors to provide the political resources to a candidate that a single contributor could provide in 1976. In addition, those resources do not go as far as they did 23 years ago. In *Buckley*, the Court noted that a full page advertisement in a major metropolitan daily cost slightly less than \$7,000, *id.* at 19 n.19; the same advertisement today would cost almost \$32,000 in *The Washington Post*, and almost \$24,000 in *The St. Louis Post-Dispatch*. In 1976, a candidate needed seven contributors to buy a full page advertisement; today, the candidate needs three or four times that number. Moreover, this difference accurately reflects the increased time, energy and resources that now consume political candidates in the task of raising money.

Just as \$1,000 buys less speech than it did in 1976, it also buys less influence, let alone corruption or the appear-

⁹ (...continued)

ments upheld, post-*Buckley* experience has shown that contribution limits help to reinforce the already substantial advantages of incumbency. See pp.18-19, *infra*.

ance of corruption. It is difficult to conceive that the *Buckley* Court would have characterized a \$350 contribution for statewide office as "large." *Id.* at 28. Thus do "distinctions in degree become . . . differences in kind." *Id.* at 30.¹⁰ Moreover, Missouri's \$1,000 limit applies to PACs as well as individuals. By contrast, the federal limits upheld in *Buckley* placed a \$5,000 cap on PAC contributions. *Id.* at 35. Even ignoring the decline in purchasing power between 1976 and 1999, therefore, Missouri has lowered the limit on PAC contributions by 80%. On this barren record, such a drastic reduction can be upheld only by ignoring the principle, so plainly acknowledged in *Buckley*, that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Id.* at 15, quoting *NAACP v. Alabama*, 357 U.S. at 460.

2. Petitioners point to statistics indicating that more money was raised and spent for statewide races in 1996 (with limits) than in 1992 (without limits), and then draw from these statistics the conclusion that SB 650 has not prevented Missouri candidates "from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. The conceptual problem with this argument is that it presumes that the state rather than the candidate knows how much money is necessary for "effective advocacy," thus reintroducing through the backdoor the same discredited notion that this Court rejected in *Buckley* when it struck down expenditure limits.¹¹

¹⁰ For this reason alone, FECA's contribution limits also merit reexamination even under the existing constitutional framework established by *Buckley*. Simply adjusting FECA for inflation since 1976 would raise the individual contribution limit to \$2,870 and the PAC contribution limit to \$14,350.

¹¹ As the Court observed in *Buckley*: "In the free society ordained by (continued...)"

The more specific problem with petitioners' reliance on average candidate expenditures is that it ignores the unrebutted affidavit testimony of respondent Fredman detailing how Missouri's contribution limits in fact affected his ability to amass the resources that he, not the state, considered necessary to mount an effective campaign. (J.A. 59-62). In *Buckley*, this Court acknowledged that the prospect that contribution limits would work to the disadvantage of minority candidates was a "troubling" one, but found that the record in *Buckley* "provides no basis for concluding that [FECA] invidiously disadvantages such candidates." *Id.* at 33. Here, Fredman's affidavit supplies that missing link.¹² At the very least, it was enough to defeat the state's motion for summary judgment. See *Hunt v. Cromartie*, __ U.S. __, 67 U.S.L.W. 4306 (May 17, 1999). As this Court noted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 894 (1992): "Legislation is measured [by] its impact on those it affects." Indeed, the history of the First Amendment would look very different if we measured the validity of legislative restrictions solely by their impact on citizens whose speech fits comfortably within the political mainstream. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641-42 (1943).¹³

¹¹ (...continued)

our Constitution it is not the government but the people -- individually as citizens and candidates and collectively as associations and political committees -- who must retain control over the quantity and range of debate on public issues in a political campaign." 424 U.S. at 57 (footnote omitted).

¹² See also *National Black Police Association v. District of Columbia Board of Elections and Ethics*, 924 F.Supp. 270, 274-75 (D.D.C. 1996); *California ProLife PAC v. Scully*, 989 F.Supp. 1282, 1299 (N.D.Cal. 1998).

¹³ Some of the most transforming political campaigns in modern Ameri-
(continued...)

In short, the Eighth Circuit properly struck down Missouri's contribution limits under *Buckley* because those limits: (a) were set so low that they burdened the ability of respondent Fredman, and similarly situated candidates, to get their message to the voters; (b) were imposed without any evidence that such burdens were needed to alleviate a specific, documented harm; and (c) were not carefully limited to the sort of "large" contributions that might arguably pose a problem of actual or apparent corruption.

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE TO RECONSIDER THE *BUCKLEY* COURT'S APPROACH TO CONTRIBUTION LIMITS

Whatever the validity of *Buckley*'s original distinction between contributions and expenditures, the legal and factual landscape has fundamentally changed in the intervening two decades. The result is a campaign finance system that is so riddled with exceptions that it is no longer plausible to claim that surviving contribution limits materially advance a "sufficiently important interest" to justify their intrusion on First Amendment rights. 424 U.S. at 25. Moreover, because what are often mischaracterized as "loopholes" in the campaign finance law are more properly understood as constitutionally compelled safe harbors for core political speech, as this Court has repeatedly recognized, the ability of contribution limits to accomplish their asserted goal is only likely to diminish with the passage of time.¹⁴

¹³ (...continued)

can history were initially funded through the support of several large contributors. See Ralph K. Winter, "The History and Theory of *Buckley v. Valeo*", 6 J.L. & Pol'y 93, 108 (1997)(citing examples).

¹⁴ As this Court observed when discussing an analogous problem in
(continued...)

Faced with such an imprecise fit between means and ends, this Court has not hesitated to strike down a variety of regulatory schemes in other contexts as a violation of the First Amendment. For example, in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Court held that the state could not prohibit only the mass media from publishing the name of a rape victim. "Without more careful and inclusive precautions against alternative forms of dissemination," the Court wrote, "we cannot conclude that Florida's selective ban on publication by the mass media satisfactorily accomplishes its stated purpose." *Id.* at 541 (footnote omitted). See also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) ("the irrationality of this unique and puzzling regulatory framework ensures" that it will fail to achieve its purported goal).

Perhaps most to the point, *Buckley* itself invalidated the limit on independent expenditures in part because "[t]he exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness . . . undermines the limitation's effectiveness as a loophole-closing provision" 424 U.S. at 45. We respectfully submit that the contribution limits approved in *Buckley* suffer from precisely the same constitutional infirmity -- a fact that is apparent now even if it was not apparent then. Put another way, the limits on campaign contributions to political candidates are unconstitutional if for no other reason than experience has shown they are so plainly ineffective. And while the Constitution does not normally require the government to adopt effective policies, it does not permit the government to abridge the First Amendment in an ineffective pursuit of even valid

¹⁴ (...continued)

Buckley. "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restrictions on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." 424 U.S. at 45.

government ends. In the case of contribution limits, both the means and the end are suspect and deserve reexamination.

Buckley identified a number of goals that Congress was seeking to achieve by creating the campaign finance regulatory system embodied in FECA. As Justice Breyer summarized it twenty years later:

[FECA] sought both to remedy the appearance of a "corrupt" political process (one in which large contributions seem to buy legislative votes) and to level the electoral playing field by reducing campaign costs. It consequently imposed limits upon the amounts that individuals, corporations, "political committees" (such as political action committees, or PACs), and political parties could *contribute* to candidates for federal office, and it also imposed limits upon the amounts that candidates, corporations, labor unions, political committees, and political parties could *spend*, even on their own, to help a candidate win election.

Colorado Republican, 518 U.S. at 609 (plurality opinion) (emphasis in original)(citations omitted).

Whether or not those goals could have been accomplished by the comprehensive campaign finance system that Congress enacted, a very different system emerged from this Court's decision in *Buckley*. In particular, the Court declared FECA's expenditure limits unconstitutional because "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment" 424 U.S. at 48-49. Accordingly, we have organized our elections for the past two decades under a campaign finance scheme that is neither the one Congress de-

signed, nor the one that the First Amendment would inspire. From the beginning, the chances that such a patchwork quilt could achieve real reform were exceedingly slim. *See id.* at 236 ("I question whether the residue leaves a workable program")(Burger, C.J., concurring and dissenting).

A. The Unintended Consequences Of Buckley

Incumbents are doing better than ever. Approximately 40 challengers won election to Congress in 1974 when the FECA amendments were first adopted. Since then, the incumbency rate has skyrocketed to 95% and beyond. The fundraising ability of incumbents continues to far outpace the fundraising ability of challengers. And personally wealthy candidates remain free to spend as much of their own money as they choose to communicate their messages, subject only to whatever political sanctions may befall candidates perceived to be trying "to buy" the election.¹⁵ By contrast, candidates who have neither personal wealth nor the advantage of incumbency have a more difficult time than ever before raising the funds needed to promote their

¹⁵ In the 1998 Democratic primary for Governor of California, two candidates with personal fortunes were defeated by a third candidate, Gray Davis, who was Lieutenant Governor and is a man of modest personal means. Davis was able to reduce this disparity through effective fundraising in part because California's contribution limits had been enjoined by court order. *See* n.12, *supra*. Also, the extent to which his opponents relied on their personal wealth afforded Davis a priceless campaign slogan: "Experience Money Can't Buy." *See* E.J. Dionne, "Big Money Loses Again," *The Denver Post*, June 3, 1998, at B11. Gray Davis is now the Governor of California. The anecdote teaches two vital lessons about campaign finance: First, candidates without personal wealth can at least attempt to level the playing field when they are able freely to raise contributions from others; second, the best ultimate arbiter of whether a candidate is trying "to buy" an election is the electorate.

candidacy.¹⁶ In addition, they are forced to spend more of their time fundraising than ever before because of rising campaign costs and low contribution limits.

This unstable situation could not and did not last. Instead, FECA's contribution limits spawned a seemingly infinite variety of new campaign finance techniques, which exacerbate the problems that FECA is intended to address while circumventing the controls that FECA places on contributions to political candidates.

First, there was the widely noted and frequently bemoaned "rise of PACs."¹⁷ Although PAC contributions to candidates are controlled by FECA, the fact that PACs can contribute five times what individuals can (under federal law, not Missouri law), and are able more easily to tap large pools of contributors, has encouraged candidate reliance on them. Independent partisan activity by PACs, which cannot be subject to legislative limits, *see FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), also became more prominent after *Buckley*. The same is true for organized labor, which spent an estimated \$35 mil-

¹⁶ In the 1996 congressional elections, incumbents who spent less than \$.5 million won every time; challengers who spent less than \$.5 million won only 3% of the time. Conversely, challengers who spent between \$.5 million and \$1 million won 40% of the time, and challengers who spent over \$1 million won 80% of the time. *See* Bradley A. Smith, "The Siren's Song: Campaign Finance Regulation and the First Amendment," 6 J.L. & Pol'y 1, 29 n.150 (1997), noted in Kathleen M. Sullivan, "Political Money and Freedom of Speech: A Reply to Frank Askin," 31 U.C. Davis L.Rev. 1083, 1089, n.30 (1998).

¹⁷ Despite frequent claims that the system is more and more inundated by PAC money, the portion of overall federal election spending that comes from PACs has remained consistent over the past five election cycles. "FEC Reports on Congressional Fundraising for 1997-98" (April 28, 1998)(available at <http://www.fec.gov/press/canye98.htm>).

lion in 1996 in an effort to return the House of Representatives to Democratic Party control.

Second, there has been the widely criticized "soft money" phenomenon that was so successfully used by both political parties in the last presidential election. By definition, soft money cannot be used to support an identifiable candidate, either through direct contributions or coordinated expenditures. See *Colorado Republican*, 518 U.S. at 616-17. Because it operates outside FECA's contribution limits, soft money can and has been raised by both parties in unlimited amounts and from otherwise prohibited sources (such as corporations). While the use of soft money traces its authority to certain FEC rulings and statutory provisions, the constitutional legitimacy of such fundraising and spending by political parties is firmly anchored in *Buckley's* core teaching that speech is wholly beyond the permissible scope of statutory control if it does not expressly advocate the election of political candidates, and in *Colorado Republican's* consensus that speech by political parties in support of their candidates cannot be presumed to be speech attributable to those candidates.¹⁸

Third, there is the increased prominence of issue advocacy in modern political life.¹⁹ Individuals who are barred

¹⁸ There has undeniably been a significant increase in soft money spending since *Buckley*. Even still, soft money accounted for less than 10% of political funding during the 1996 federal elections, see Bradley A. Smith, "Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban," in "Campaign Finance Reform Symposium: The Current Debate Over Soft Money," 24 J.Legis. 179, 180 n.6 (1998), and "less than 20% of total political spending." See Bradley A. Smith, "Reform Bill Unconstitutional," USA Today, May 20, 1999, at 14A.

¹⁹ This may be an unintended consequence of candidate contribution limits, but it is not an unexpected one. In arguing against the constitution-
(continued...)

from giving substantial support to the candidates of their choice by FECA's contribution limits remain constitutionally entitled to provide unlimited support to advocacy groups in the hope of creating a climate of opinion favorable to their preferred candidates.²⁰ Issue advocacy groups became a focal point for debate during the 1996 elections because of claims that much of their political speech was linked directly to criticism of incumbent candidates in terms that were tantamount to -- but legally not within -- the meaning of "express advocacy." This, in turn, has fueled persistent calls for new statutory controls. Proposals to limit issue advocacy, however, are constitutionally infirm for reasons this Court made clear in *Buckley*: "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." 424 U.S. at 45.²¹ In practical

¹⁹ (...continued)

ality of candidate contribution limits, the challengers in *Buckley* predicted that upholding such limits would simply cause wealthy individuals to seek other funding outlets immune from controls, such as the support of issue advocacy. "Limits on individual contributions will, moreover, induce potential political contributors to donate funds instead to 'issue' groups. That in turn may create additional pressure for Congress and the courts to see that 'issue' organizations also are regulated in the way that political campaigns are -- a clearly unconstitutional approach" Appellants' Brief at 126, *Buckley v. Valeo*, No. 75-436.

²⁰ The one provision of FECA unanimously struck down by the lower court in *Buckley* would have regulated issue advocacy by groups across the ideological spectrum by limiting, *inter alia*, the use of legislative scorecards to monitor the position of political candidates on designated issues. *Buckley v. Valeo*, 519 F.2d. 821, 876-78 (D.C.Cir. 1975).

²¹ Estimates of the actual amount of money spent on issue advocacy necessarily vary depending on how broadly one defines the term. There is disagreement, for example, on whether the term properly applies only to
(continued...)

terms, therefore, issue advocacy is unconstrained by statutory limits despite its sometimes partisan impact; on the other hand, funding that helps a candidate respond directly to such speech is subject to the strictest of controls.

Finally, contribution limits have had at least one other unintended consequence: magnifying the influence of the media and their wealthy owners. Favorable news media coverage and editorial support can make or break a candidate. It has been observed that more voters carry a newspaper's election day recommendations into the polling booth with them than carry an issue group's scorecard or a candidate's flyer or a party's slate card. Yet, the individual and corporate owners of major media outlets are wholly immune from any campaign finance controls on the use of their resources to affect electoral outcomes, while candidates who wish to reply to a media attack are limited in their ability to seek financial contributions from their supporters. The ACLU, of course, has repeatedly defended the unfettered privilege of the press to report on and comment about political candidates, *see Mills v. Alabama*, 384 U.S. 214 (1966), but there is no warrant for affording less protection to those who invoke the First Amendment to help underwrite a candidate's response to the media. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 712 (1990)(Kennedy, J., dissenting, joined by O'Connor and Scalia, JJ.)("[T]he rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities")(quoting Justice Brennan in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985)).

²¹ (...continued)

advertisements that specifically identify a particular candidate. Of course, the ambiguity of the term poses its own First Amendment problems.

B. A Constitutional Response To The Post-Buckley Dilemma

As demonstrated above, two decades after *Buckley* we are once again confronted with a campaign finance world that, to borrow President Lyndon Johnson's evocative expression, is "more loophole than law." The New York Times, Oct. 3, 1972, at 44. How, then, can we continue to treat political contributions as a constitutional stepchild subject to regulations that would not be tolerated in any other First Amendment sphere involving political speech? And, how can we continue to justify a legislative scheme that is so clearly at odds with the normal First Amendment proscription against content-based regulation? As Justice Kennedy said in a related setting, a regime which relies upon and employs such distinctions embodies "the rawest form of censorship" *Austin v. Michigan Chamber of Commerce*, 494 U.S. at 700 (dissenting opinion). The answer to the first question is we cannot. The answer to the second question is we should not.

1. The Contribution/Expenditure Divide

Ever since *Buckley*, there has been a raging debate about the merits of the Court's distinction between contributions and expenditures. The logical fallacies inherent in this distinction were recently explored at length by Justice Thomas:

Though we said in *Buckley* that controls on spending and giving "operate in an area of the most fundamental First Amendment activities," *id.* at 14, we invalidated the expenditure limits of FECA and upheld the Act's contribution limits. The justification we gave for the differing results was this: "The expenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and

diversity of political speech," *id.* at 19, whereas "limitation[s] upon the amount that any one person or group may contribute to a candidate or political committee entail only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 20-21. This conclusion was supported mainly by two assertions about the nature of contributions: First, though contributions may result in speech, that speech is by the candidate and not by the contributor; and second, contributions express only general support for the candidate but do not communicate the reasons for that support. *Id.* at 21. Since *Buckley*, our campaign finance jurisprudence has been based in large part on this distinction between contributions and expenditures

In my view, the distinction lacks constitutional significance, and I would not adhere to it. As Chief Justice Burger put it: "[C]ontributions and expenditures are two sides of the same First Amendment coin." *Buckley v. Valeo*, 424 U.S. at 241 (concurring in part and dissenting in part). Contributions and expenditures both involve core First Amendment expression because they further the "discussion of public issues and debate on the qualifications of candidates . . . integral to the operation of the system of government established by our Constitution." *Id.* at 14. When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself. Indeed, the in-

dividual may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the individual. The contribution of funds to a candidate or to a political group thus fosters the "free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), just as an expenditure does.

Colorado Republican, 518 at 635-36 (Thomas, J., concurring and dissenting)(footnotes omitted).

To this we would add four observations: First, providing financial support for candidates or causes of one's choosing should not be dismissed as "proxy speech" because it is a critical embodiment of freedom of association, which has long been given comparable protection to freedom of speech. See *NAACP v. Alabama*, 357 U.S. 449. Second, the fact that the amount or size of a contribution is characterized as "only" an expression of the intensity of the donor's support for the candidate or cause should not be the basis for lesser protection because respecting the intensity of a message is a recognized part of the First Amendment landscape. See *Cohen v. California*, 403 U.S. 15, 26 (1971) (recognizing the importance of the emotive as well as the cognitive function of speech). Third, under traditional First Amendment principles, it is no answer to say that the impact of limits is mitigated by the contributor's ability to express his or her political preferences through other means. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). Finally, the reallocation of a contributor's funds to other political speech is very likely to undermine its efficacy. To take one simple example, a supporter who gives \$5,000 to a favored candidate may help that candidate purchase a full-page newspaper advertisement. Acting

alone, the contributor would not have the funds necessary to reach a similarly large audience.

2. An Indefensible Status Quo

Because of the disparate treatment of contributions and expenditures, we have a system of freedom of expression in the campaign finance area whose inconsistencies and incongruities undermine the goals of reduced "corruption" and expanded political participation that have been claimed as its principal justification. In First Amendment terms, we have created a political speech code under which the choice between freedom or restraint turns on the identity of the speaker, the content of the speech and, if pending proposals are enacted into law, the timing of the speech as well.²² Funding given directly to candidates, coordinated with candidates, or expressly advocating the election or defeat of candidates, is subject to the elaborate and restrictive limits of FECA and comparable state statutory schemes. The funding of *all* other political speech that may affect the climate of opinion in which electoral outcomes are determined is left wholly unrestrained in accordance with First Amendment imperatives (as well as democratic principles).²³ The result has been a political line-drawing exercise that can best be described as arbitrary and irrational.²⁴ More troubling

²² See H.R. 417, Section 201(b), 106th Cong., 1st Sess. (1999)(Shays-Meehan bill)(defining as "express advocacy" any paid radio or television advertisement referring to a "clearly identified candidate" within 60 days of an election).

²³ See Bradley A. Smith, "Essay: Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform," 105 Yale L.J. 1049, 1061-64 (1996)(arguing that campaign funding controls undermine democratic participation and change).

²⁴ For example, the "Harry and Louise" ads broadcast by the insurance (continued...)

still, it has too often been used to stifle the speech of the politically powerless, notwithstanding the claim that it would help level the playing field. See *FEC v. Central Long Island Tax Reform*, 616 F.2d 45 (2d Cir. 1980).

This disparate regime of "raw censorship," which deviates so dramatically from normal First Amendment principles, plainly fails to embody the "precision of regulation" that those principles demand. Instead, in a sweepingly over-inclusive way, the system enforces a prophylactic rule against "large" contributions, regardless of their potential for corruption, and despite the existence of more targeted laws requiring disclosure and prohibiting bribery or conflicts of interest. Furthermore, the current system allows the restraint of core political speech on the basis of vague concepts like "corruption" or, worse, "the appearance of corruption." Compare *United States v. Sun Diamond Growers*, ___ U.S. ___, 67 U.S.L.W. 4265 (May 4, 1999)(violation of federal gratuity statute requires link between gift and official act).

These consequences point up the very essence of the intractable campaign finance dilemma and the inherent instability of campaign finance controls. The more one regulates, the more one risks offending the First Amendment, as illustrated by the flawed FECA provisions struck down in *Buckley*. The less one regulates, the less effective the remaining regulations will be and the harder it therefore be-

²⁴ (...continued)

industry in response to President Clinton's health care proposals in 1994 may well have helped the Republicans regain control of the House of Representatives for the first time in sixty years, yet they were beyond FEC control because they did not represent either a contribution or a coordinated expenditure. Similarly, the 1995 Medicare ads broadcast by the Democratic National Committee were arguably beyond FEC control although many commentators believe they influenced the outcome of the 1996 presidential election. See Anthony Corrado, "Giving, Spending and 'Soft Money,'" 6 J.L. & Pol'y 45, 50-51 (1997).

comes to justify halfhearted measures like the post-*Buckley* regime. *Buckley*'s well-intentioned effort to strike the balance by splitting the difference between contributions and expenditures, and between explicitly electoral speech and all other messages that may potentially affect political outcomes by influencing the climate of opinion, simply has not achieved the equilibrium desired or withstood the test of time.

3. A Constitutionally Preferable Solution

As in *Buckley*, the Court is once again at a constitutional crossroad. There are rational solutions to the campaign finance dilemma, but they do not lie in the direction of more limits on speech and the financing that makes speech audible. Instead, they are to be found in the direction that the First Amendment, properly regarded, has always led -- the path of "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring). We respectfully submit that a program of campaign finance reform that is consistent with the First Amendment would include three essential elements.

First, we can and should require instantaneous disclosure of large contributions to political candidates and campaigns, which will facilitate timely reporting and analysis by government agencies, news media and private campaign watchdog groups.²⁵ The value of disclosure is too often underestimated as an informational tool enabling the public to exercise its electoral power intelligently, and also as an antidote to corruption or undue influence. In *Buckley v. American Constitutional Law Foundation*, 119 S.Ct. at 657 (citation omitted), Justice O'Connor recently noted (speak-

ing for herself and Justice Breyer), that disclosure is an "essential cornerstone of effective campaign finance reform."²⁶ That is even more true today than it was a generation ago because technological advances now permit almost instantaneous filing and public dissemination.

Second, we can and should implement a serious system of public financing. As the Court commented in the portion of *Buckley v. Valeo* upholding public financing for presidential elections: "Subtitle H [the public financing provision] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values." 424 U.S. at 92-93 (footnotes omitted). The ACLU shares that view, and has long supported adequate and equitable public financing of qualified candidates as the least restrictive and most effective way to bring about *real* campaign finance reform. By eliminating the need for candidates to depend entirely on private contributions, public financing represents a far more direct response to whatever problems may exist with corruption or the appearance of corruption. And, by providing critical resources to candidates who lack personal wealth, public financing is far more likely than contribution limits to expand the electoral marketplace by introducing new faces and new ideas. Contribution limits thus represent the worst of both worlds: they are simultaneously less effective and more restrictive than the public financing alternative. At least until public financing has been tried and failed, the singleminded reliance on con-

²⁵ The recent decision in *FEC v. Akins*, 524 U.S. 11 (1998), provides additional opportunity for citizens and groups to seek enforcement of campaign disclosure rules and regulations.

²⁶ See Kathleen M. Sullivan, "Edward J. Barrett, Jr. Lecture on Constitutional Law: Political Money and Freedom of Speech," 30 U.C. Davis L. Rev. 663, 688 (1997)(discussing value of disclosure).

tribution limits cannot be reconciled with core First Amendment principles.

Third, we can and should regard political accountability as the appropriate constitutional check on "excessive" fundraising and spending. Let candidates decide whether to make an issue out of an opponent's high budget campaign. Similarly, let the voters decide whether particular candidates are relying too heavily on large contributions. In short, let us show the courage of the framers and put our faith in the people, not the government, to distinguish between public interest and special interest and choose their elected officials accordingly.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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